(18,515.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 316.

TOLTEC RANCH COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE WARD, G. J. WELLS, C. F. WELLS, JOSEPH DUDLEY, AND CHARLES DUDLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
vs.
GEORGE COOK ET AL., Respondents.

Filed in supreme court of the State of Utah January 18, 1902.
L. P. PALMER, *Clerk*,
By H. W. GRIFFITH, *Deputy*.

1 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
v.
GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE WARD, G. J. WELLS, C. F. WELLS, JOSEPH DUDLEY, and CHARLES DUDLEY, Defendants. } Complaint.

Plaintiff complains and alleges:

That it is now and at all the times hereinafter alleged was a corporation organized and existing under and by virtue of the laws of the State of California.

2. That the said plaintiff is now and for a long time has been the owner in fee and entitled to the possession of all that certain real estate situate in Box Elder county, State of Utah, and particularly described as follows: The southeast quarter of the southeast quarter of section twenty-seven (27), township eight (8), north range two west Salt Lake meridian, U. S. survey.

3. That the said plaintiff claims title in fee to the said premises and that the said defendants claim an estate or interest therein adverse to plaintiff.

4. That the claims of the said defendants and each of them are without any right whatever, and that the said defendants or either of *of* them have not any estate, right, title or interest whatever in said lands or premises, or any part thereof.

Wherefore plaintiff prays judgment:

1. That the defendants and each of them may be required to set forth the nature of their claims, and that all adverse claims of the defendants may be determined by a decree of this court.

2 2. That by said decree it be declared and adjudged that the defendants and each of them have no estate or interest whatever in or to said land and premises, and that the title of plaintiff is good and valid.

3. That the defendants and each of them be forever enjoined and debarred from asserting any claim whatever in or to said lands or premises adverse to plaintiff, and for such other and further relief as to the court may seem meet and equitable, and for costs of suit.

JOHNSON & CHASE,
Attorneys for Plaintiff.

STATE OF UTAH, } ss:
County of Box Elder, }

E. R. Chase being first duly sworn deposes and says: That he is attorney and agent for the plaintiff herein, and makes this verification for the reason that the said plaintiff, and each of its officers are absent from the county in which its said attorney and agent resides; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge.

EDWARD R. CHASE.

Subscribed and sworn to before me this the 31st day of January, 1901.

GEORGE R. CHASE,
Notary Public.

[SEAL.]

My commission expires June 23, 1903.

3 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants. } Demurrer.

Demurrer of defendants George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells and C. F. Wells, alleges:

That the court has no jurisdiction of the person of defendants, or the subject-matter of the action.

That there is a misjoinder of parties defendant in this, that George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells and C. F. Wells have no interest whatever in common with each other, and they should not be joined in this proceeding.

That several causes of action have been improperly united, that is, a separate cause of action against each of the defendants is joined in one.

That the complaint does not state facts sufficient to constitute a cause of action.

B. H. JONES.
Attorney for George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, and F. C. Wells.

Service of a copy of the within demurrer is admitted this 15th day of February, 1901.

JOHNSON AND CHASE.

4 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE WARD, G. W. Wells, C. F. Wells, Joseph Dudley, *et al.*, Defendants.

Separate Demurrer of Joseph Dudley.

Now comes Joseph Dudley, one of the defendants in the above-entitled action, and files his separate demurrer to plaintiff's complaint, and sets up the following grounds to wit:

1st. That there is a misjoinder of parties defendant in this: that each of said defendants is improperly united in said action with this defendant, and that this defendant is improperly united as a party with each of said defendants.

2nd. That the said complaint does not state facts sufficient to constitute a cause of action.

3rd. That the complaint is ambiguous, unintelligible and uncertain in this—that it does not appear that the said defendants jointly claim an interest in the whole of said property or severally claim a whole interest in any part of said forty acres.

RICY H. JONES,
Attorney for Defendant Joseph Dudley.

5 Minute-book entry No. 2, page 4, February term, 1901.

THURSDAY, *the 25th day of April*, 1901.

TOLTEC RANCH COMPANY
vs.
GEO. N. COOK ET AL. } # 406.

On this day came on for hearing defendants' motions and demurrers to plaintiff's complaint; T. D. Johnson, Esq., appearing for plaintiff and Ricy H. Jones and B. H. Jones, Esq., appearing for defendants. After hearing arguments of counsel for respective parties, court ordered that motions be, and the same are hereby denied, and demurrers be and the same are hereby overruled.

6 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Now comes S. N. Cook, one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this defendant is improperly joined with the other defendants as to the specific tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5th. That for a separate defense this defendant alleges that he and his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit:

Commencing at the N. W. corner of the S. E. quarter of the S. E. quarter of sec. 27, T. 8 *M.*, R. 2. W.; thence E. 3.94 chains thence *L.* 33 deg. 37′ E. 1.05 chains; thence N. 89′ W. 4.56 chains; thence N. 83 *L.* to point of beginning, containing 36/100 acres. That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing, and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

7 Wherefore defendant prays a decree awarding to him the said lands described above as the owner thereof, and for such other and further relief as may be just, and for costs of suit.

B. H. JONES AND
RICY H. JONES,
Attorneys for Defendants.

STATE OF UTAH, }
County of Box Elder, } *ss:*

S. N. Cook being first duly sworn deposes: That he is one of the defendants in the above-entitled action who files the foregoing separate answer; that he has heard read the said answer, and knows he contents thereof; that the same is true of his own knowledge,

except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

S. N. COOK.

Subscribed and sworn to before me this 23rd day of March, 1901.

RICY H. JONES,
Notary Public.

8 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Now comes Alfred Ward, one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this defendant is improperly joined with the other defendants as to the specifiec tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5th. That for a separate defense this defendant alleges that he and his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit: Commencing 13.66 chns. north of the S. E. cor. of section 27, T. 8, R. 2 W., thence N. 89 deg. 19″ W., 10.06 chns.; thence N. 33′ 37″ W. 6.40 chns.; thence *L.* 89′ E. 13.60 chns.; thence S. 5.21 chns. to beginning, containing 6.12 acres exclusive of the railway claim. That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing,

and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

9 Wherefore defendant prays a decree awarding to him the said lands described above as the owner thereof, and for such other and further relief as may be just, and for costs of suit.

B. H. JONES AND
RICY H. JONES,
Attorneys for Defendants.

STATE OF UTAH, }
County of Box Elder, } ss:

Alfred Ward, being first duly sworn says that he is the defendant above named; that he has heard read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, as to those matters that he believes it to be true.

ALFRED WARD.

Subscribed and sworn to before me this 22nd day of March, 1901.

[SEAL.] RICY H. JONES,
Notary Public.

10 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, }
vs. }
GEORGE COOK ET AL., Defendants. }

Now comes Geo. J. Wells, one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this defendant is improperly joined with the other defendants as to the specifiec tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest

or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5th. That for a separate defense this defendant alleges that he and his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit: Commencing 10.22 chains N. of the S. E. corner of sec. 27, T. 8 *M.*, R. 2 W.; thence N. 89′ 29″ W. 20 chains; thence N. 1.75 chns. thence *L.* 89′ 24″ E. 20 chns.; thence S. 1.72 chns. to point of beginning, containing 3.16 acres exclusive of the railway claim. That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing, and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—.

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

11 Wherefore defendant prays a decree awarding to him the said lands described above as the owner thereof, and for such other and further relief as may be just, and for costs of suit.

B. H. JONES AND
RICY H. JONES,
Attorneys for Defendants.

STATE OF UTAH, }
County of Box Elder. } *ss:*

Geo. J. Wells, being first duly sworn says that he is the defendant above named, and makes this verification on his own account; affiant further says that he has heard read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters that he believes it to be true.

GEO. J. WELLS.

Subscribed and sworn to before me this 22nd day of March, 1901.

B. H. JONES,
Notary Public.

12 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Now comes C. F. Wells one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this defendant is improperly joined with the other defendants as to the specific tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5th. That for a separate defense this defendant alleges that he and his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit: Commencing 11.94 chns. N. of the S. E. corner of sec. 27, T. 8 *M.* R. 2 W.; thence *M.* 89 deg. 24″ W. 20 chns.; thence N 1.72 chns.; thence *L.* 89′ E. 20 chns.; thence S. 1.72 chns. to point of beginning containing 3.16 acres exclusive of the railway claim. That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing, and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

13 Wherefore defendant prays a decree awarding to him the said lands described as above as the owner thereof, and for such other and further relief, as may be just, and for costs of suit.

B. H. JONES AND
RICY H. JONES,
Attorneys for Defendants.

STATE OF UTAH, } ss:
County of Box Elder, }

Carson F. Wells being first duly sworn says that he is the defendant above named, that he has heard read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief; as to those matters that he believes it to be true.

C. F. WELLS.

Subscribed and sworn to before me this 22nd day of March 1901.

B. H. JONES,
Notary Public.

Service of copies of the answers of Geo. Ward, S. N. Cook, Carson F. Wells, Jos. Dudley, Geo. J. Wells, Alfred Ward and Charles H. Dudley, Geo. Cook is hereby acknowledged.

March 29, 1901.

JOHNSON AND CHASE,
Attorneys for Plaintiff.

14 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Now comes Chas. H. Dudley, one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this defendant is improperly joined with the other defendants as to the specifiec tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5. That for a separate defence this defendant alleges that he and

his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit:

Commencing at the S. E. cor. of sec. 27, T. 8 N. R. 2 W.; thence west 20 chains, thence N. 3 chains; thence *L.* 89′ 31″ E. 20 chns. thence S. 2.83 chns. to place of beginning, containing 5.28 acres exclusive of the railway claim.

That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing, and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

15 Wherefore defendant prays a decree awarding to him the said lands described above as the owner thereof, and for such other and further relief as may be just, and for costs of suit.

B. H. JONES AND
RICY H. JONES,
Attorneys for Defendants.

STATE OF UTAH, }
County of Box Elder, } *ss:*

Jos. S. Dudley being first duly sworn says that he is onw of the defendants above named, and makes this verification for his brother C. H. Dudley; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, as to those matters that he believes it to be true.

JOSEPH S. DUDLEY,
For C. H. Dudley.

Subscribed and sworn to before me this 22nd day of March.

RICY H. JONES,
Notary Public.

16 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, }
vs.
GEORGE COOK ET AL., Defendants. }

Now comes Jos. Dudley, one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this

defendant is improperly joined with the other defendants as to the specific tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5th. That for a separate defense this defendant alleges that he and his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit:

Commencing 2.83 chns. N. of the S. E. corner of sec. 27, T. 8 *M.* R. 2 W.: thence N. 89′, 31″ W. 20 chns.; thence N. 30′ 90 chns.; thence *L.* 89′, 29″ E. 20 chns.; thence S. 3.89 chns. to point of beginning, containing 7.09 acres exclusive of the railway claim.

That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing, and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

17 Wherefore defendant prays a decree awarding to him the said lands described above as the owner thereof, and for such other and further relief as may be just, and for costs of case.

B. H. JONES AND
RICY H. JONES,
Attorneys for Defendants.

STATE OF UTAH, }
County of Box Elder, } ss:

Joseph S. Dudley, being first duly sworn says that he is the defendant above named; that he has heard read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated on information and belief, as to those matters he believes it to be true.

JOSEPH S. DUDLEY.

Subscribed and sworn to before me this 22nd day of March 1901.
[SEAL.] B. H. JONES,
Notary Public.

18 In the District Court of the First Judicial District of the State of Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Now comes Geo. Ward, one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this defendant is improperly joined with the other defendants as to the specific tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5th. That for a separate defense this defendant alleges that he and his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit: Commencing 13.90 chns. N. of the S. W. cor. of the S. E. quarter of the S. E. quarter of sec. 27, T. 8 *M.* R. 2 W.; thence N. 5.33 chns.; thence *L.* 89′ E. 4.56 chns.; thence *L.* 33′ 37″ E. 6.40 chns. N. 89′ W. 8.06 chns. to point of beginning containing 3.32 acres. That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing, and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—.

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

19 Wherefore defendant prays a decree awarding to him the said lands described above as the owner thereof, and foe such other and further relief as may be just, and for costs of suit.

B. H. JONES AND
RICY H. JONES.
Attorneys for Defendants.

STATE OF UTAH, }
County of Box Elder, } *ss:*

B. H. Jones being first duly sworn says that he is the attorney for the defendant above named and makes this verification on account of the absence of the defendant from Box Elder county, where affiant resides; affiant further says that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knnowledge except as to those matters stated on information and belief as to those matters that he believes it to be true.

B. H. JONES,

Subscribed and sworn to before me this 22nd day of March, 1901.
[SEAL.] RICY H. JONES,
Notary Public.

20 In the District Court of the First Judicial District of the State Utah, County of Box Elder.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, }
vs.
GEORGE COOK ET AL., Defendants. }

Now comes George Cook, one of the above defendants, and files this his separate answer to plaintiff's complaint filed herein, and alleges:

1st. For a special defense this defendant alleges that there is a misjoinder of parties defendant in said complaint in this: that this defendant is improperly joined with the other defendants as to the specifiec tract of land hereinafter claimed and described by him, because the other defendants neither have nor claim any interest in said tract; that the other defendants are improperly joined with this defendant as to the remainder of the land described in said complaint to which this defendant sets up no title or interest, but disclaims.

2nd. Admits the corporate existence of the plaintiff company.

3rd. Denies that the plaintiff is or ever has been the owner in fee, or entitled to that portion of the land described in the complaint which is claimed by this defendant, and which is hereinafter described by metes and bounds, and disclaims any interest or estate in the remainder of the tract described in said complaint.

4th. Denies that this defendant claims any interest or estate adverse to plaintiff or to any person in any portion of the land described in said complaint except as to that special tract hereinafter described and claimed by this defendant.

5th. That for a separate defense this defendant alleges that he and his grantors and predecessors have claimed, possessed and owned the following portion of the land described in plaintiff's complaint for more than thirty years peaceably, continuously and adversely to the plaintiff, and the world, and is now the owner thereof and seized thereto, to wit: Commencing at the N. E. cor. of the S. E. quarter of the S. E. quarter of sec. 27, T. 8 *M.*, R. 2 W.: thence S. 1.19 chns.; thence *M.* 89′ W. 13.60 chns.; thence *M.* 33′ 37″ W. — chns.; thence E. 14.20 chns. to point of beginning, containing 1.37 acres of the railway claim. That this defendant and those under whom he claims have made lasting and valuable improvements on said land by plowing, clearing, cultivating and fencing, and otherwise improving the same to the permanent enhancement of the value thereof in the sum of $—

6th. That plaintiff's cause of action so far as defendant'- interest and estate and claim in land is concerned is barred by the statute of limitations as provided by section- 2856 to 2872 inclusive of the Revised Statutes of Utah.

21 Wherefore defendant prays a decree awarding to him the said lands described above as the owner thereof, and for such other and further relief as may be just, and for costs of suit.

B. H. JONES AND
RICY H. JONES,
Attorneys for Defendants.

STATE OF UTAH, }
County of Box Elder, } ss:

B. H. Jones being first duly — deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and makes this verification on his behalf for the reason that said defendant is absent from Brigham City and the facts are within affiant's knowledge; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated on his information and belief and as to those matters that he believes it to be true.

B. H. JONES.

Subscribed and sworn to before me this 29th day of March, 1901.
[SEAL.]
RICY H. JONES,
Notary Public.

22 In the District Court, 1st Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants. } Plaintiff's Interrogatories.

1. When was the land in dispute and described in the complaint surveyed.

2. When did the defendant George Cook first claim title to the land set out in his answer.

3. When did S. N. Cook first claim title to the land set out in his answer.
4. When did Alfred Ward first claim title to the land set out in his answer.
5. When did George Ward first claim title to the land described in his answer.
6. When did G. J. Wells first claim title to the land described in his answer.
7. When did C. F. Wells first claim title to the land described in his answer.
8. When did Joseph Dudley first claim title to the land described in his answer.
9. When did Charles Dudley first claim title to the land described in his answer.
10. What if anything was the claim of right under which and upon which the defendants base their several claims.
11. Who has paid the taxes legally assessed upon the lands in dispute and for what years.

Refused except as otherwise covered in interrogatories.

HART, *J.*

23 In the District Court of the First Judicial District of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Interrogatories Submitted to Jury.

Have the defendants S. N. Cook and George Cook been in the open, actual, continuous, notorious, exclusive and hostile possession of the tract described in *his* answer?

Answer. Yes.

If so, during what time?

Answer. From April 4th, 1882, till the present time.

Under what claim of right, if any, has the said defendants claimed the said land?

Answer. By purchase.

If claimed, for what period have they claimed in their own right?

Answer. Ever since April 4, 1882.

For what period have their predecessor or grantors claimed it?

Answer. From October 20th, 1868 till April 4, 1882.

Who has paid the taxes upon the premises described in the complaint, and for what years?

Answer. Partly defendants, and partly plaintiff. Jury do not know what years.

JOHN BURROWS, *Foreman.*

24 In the District Court of the First Judicial District, County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
—
S. N. COOK and GEORGE COOK, Defendants. } Verdict.

We, the jury empanneled in the above-entitled cause, find the issues joined herein in favor of the said defendants and against the plaintiff, no cause of action.

JOHN BURROWS, *Foreman.*

Dated May 18, 1901.

25 In the District Court of the First Judicial District of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Interrogatories Submitted to Jury.

Have the defendants Carson F. Wells and George J. Wells been in the open, actual, continuous, notorious, exclusive and hostile possession of the tract described in *his* answer?

Answer. Yes.

If so, during what time?

Answer. From November 23, 1891, till the present time.

Under what claim of right, if any, *has* the said defendants claimed the said land?

Answer. By purchase.

If claimed, for what period have they claimed in their own right?

Answer. From Nov. 23rd, 1891, till the present.

For what period have their predecessor or grantors claimed it?

Answer. From October 20, 1868 to Nov. 23rd, 1891.

Who has paid the taxes upon the premises described in the complaint, and for what years?

Answer. Partly defendants, and partly plaintiff. Jury do not know what years.

JOHN BURROWS, *Foreman.*

26 In the District Court of the First Judicial District, County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
—
G. J. WELLS and C. F. WELLS, Defendants. } Verdict.

We, the jury empanneled in the above-entitled cause find the issues joined herein in favor of the said defendants and against the plaintiff, no cause of action.

JOHN BURROWS, *Foreman.*

Dated May 18, 1901.

27 In the District Court of the First Judicial District of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Interrogatories Submitted to Jury.

Has the defendant Joseph Dudley been in the open, actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer?

Answer. Yes.

If so, during what time?

Answer. From October 20, 1868 till the present.

Under what claim of right, if any, has the said defendants claimed the said land?

Answer. Inheritance—deed destroyed by fire.

If claimed, for what period *have they* claimed in *their* own right?

Answer. From the date of his lost deed till the present time.

For what period has his predecessor or grantors claimed it?

Answer. From Oct. 20, 1868 till deed was given.

Who has paid the taxes upon the premises described in the complaint, and for what years?

Answer. Partly defendants, and partly plaintiff. Jury do not know what years.

JOHN BURROWS, *Foreman.*

28 In the District Court of the First Judicial District, County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
—
JOSEPH DUDELY, Defendants.
} Verdict.

We, the jury empanneled in the above-entitled cause find the issues joined herein in favor of the said defendants and against the plaintiff, no cause of action.

JOHN BURROWS, *Foreman.*

Dated May 18, 1901.

29 In the District Court of the First Judicial District of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Interrogatories Submitted to Jury.

Has the defendant Charles H. Dudley been in the open, actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer?

Answer. Yes.

If so, during what time?

Answer. From October 20, 1868, to the present time.

Under what claim of right, if any, has the said defendants claimed the said land?

Answer. Inheritance deed destroyed by fire.

If claimed, for what period *have they* claimed in *their* own right?

Answer. From 1868 till the present time.

For what period *have their* predecessors or grantors claimed it?

Answer. From Oct. 28th, 1868 till deed was given.

Who has paid the taxes upon the premises described in the complaint, and for what years?

Answer. Partly defendants, and partly plaintiff. Jury do not know what years.

JOHN BURROWS, *Foreman.*

30 In the District Court of the First Judicial District, County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
—
CHARLES H. DUDLEY, Defendants.
} Verdict.

We, the jury empanneled in the above-entitled cause find the issues joined herein in favor of the said defendants and against the plaintiff, no cause of action.

JOHN BURROWS, *Foreman.*

Dated May 18, 1901.

31 In the District Court of the First Judicial District of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Interrogatories Submitted to Jury.

Has the defendant Alfred Ward been in the open, actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer?

Answer. Yes.

If so, during what time?

Answer. From April 9th, 1896, till the present time.

Under what claim of right, if any, has the said defendants claimed the said land?

Answer. By purchase.

If claimed, for what period *have they* claimed in *their* own right?

Answer. From April 9th, 1896, till the present.

For what period *have their* predecessor or grantors claimed it?

Answer. From October 20, 1868, till April 9, 1896.

Who has paid the taxes upon the premises described in the complaint, and for what years?

Answer. Partly defendants, and partly plaintiff. Jury do not know what years.

JOHN BURROWS, *Foreman.*

32 In the District Court of the First Judicial District, County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
—
ALFRED WARD, Defendant.
} Verdict.

We, the jury empanneled in the above-entitled cause find the issues joined herein in favor of the said defendant and against the plaintiff, no cause of action.

JOHN BURROWS, *Foreman.*

Dated May 18, 1901.

33 In the District Court of the First Judicial District of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Interrogatories Submitted to Jury.

Has the defendant George Ward been in the open, actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer?

Answer. Yes.

If so, during what time?

Answer. From April 20th 1885 till the present time.

Under what claim of right, if any, has the said defendants claimed the said land?

Answer. By purchase.

If claimed, for what period *have they* claimed in *their* own right?

Answer. From April 30, 1885 till the present time.

For what period *have their* predecessor or grantors claimed it?

Answer. From Oct. 20, 1868, till April 30, 1885.

Who has paid the taxes upon the premises described in the complaint, and for what years?

Answer. Partly defendants, and partly plaintiff. Jury do not know what years.

JOHN BURROWS, *Foreman.*

34 In the District Court of the First Judicial District, County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
—
GEORGE WARD, Defendants.
} Verdict.

We, the jury empanneled in the above-entitled cause find the issues joined herein in favor of the said defendants and against the plaintiff, no cause of action.

JOHN BURROWS, *Foreman.*

Dated May 18, 1901.

35 In the District Court of the First Judicial District, County of Box Elder, State of Utah—Hon. Chas. H. Hart, Judge.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Judgment on Verdict in Open Court 18th Day of May, A. D. 1901.

This action came on regularly for trial. The said parties appearing by their attorneys T. D. Johnson, Esq., counsel for plaintiff, and Ricy H. Jones and B. H. Jones, Esq., for defendants. A jury of eight persons was regularly empanneled and sworn to try said action. Witnesses on the part of plaintiff and defendant- were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and on their oaths say:

We, the jury empanneled in the above-entitled cause, find the issues joined herein in favor of said defendants and against the plaintiff, no cause of action.

Dated May 18th, 1901.

JOHN BURROWS, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said judgment herein be in favor of said defendant and against the said plaintiff, no cause of action, and that said defendant do have and recover the costs and disbursements incurred in this action, amounting to the sum of — dollars.

Interrogatories Submitted to Jury.

Has the defendant Charles H. Dudley been in the open actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer.

Answer. Yes.

If so, during what time?

Answer. From Oct. 20, 1868 till the present.

Under what claim of right, if any, has the said defendant claimed the said land?

Answer. Inheritance deed destroyed by fire.

If claimed, for what period has he claimed in his own right

—. From 1868 till the present time

And for what period has his predecessors or grantor claimed it?

Answer. From Oct. 20, 1868 till deed was given

Who has paid the taxes upon the premises described in the complaint, and for what years.

Answer. Partly defendants and partly plaintiff. Jury do not know what year.

JOHN BURROWS, *Foreman.*

Judgment recorded the 23rd day of May, A. D. 1901.

Judgment Record One, page 384.

Judgment Docket, — page —.

36 In the District Court of the First Judicial District, County of Box Elder, State of Utah—Hon. Chas. H. Hart, Judge.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Judgment on Verdict in Open Court 18th Day of May, A. D. 1901.

This action came on regularly for trial. The said parties appearing by their attorneys T. D. Johnson, Esq., counsel for plaintiff, and Ricy H. Jones and B. H. Jones, Esq., for defendants. A jury of eight persons was regularly empanneled and sworn to try said action. Witnesses on the part of plaintiff and defendant- were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and on their oaths say:

We, the jury empanneled in the above-entitled cause, find the issues joined herein in favor of said defednants and against the plaintiff, no cause of action.

Dated May 18th, 1901.

JOHN BURROWS, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said judgment herein be in favor of said defendant and against the said plaintiff, no cause of action, and that said defendant do have and recover the costs and disbursements incurred in this action, amounting to the sum of — dollars.

Interrogatories Submitted to Jury.

Has the defendant Alfred Ward been in the open, actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer.

Answer. Yes.

If so, during what time?

Answer. From April 9, 1896 till the present time.

Under what claim of right, if any, has the said defendant claimed the said land?

Answer. By purchase.

If claimed, for what period has he claimed in his own right?

—. From April 9, 1896 till the present.

And for what period has his predecessors or grantor claimed it?

Answer. From Oct. 20, 1868 till April 9, 1896.

Who has paid the taxes upon the premises described in the complaint, and for what years.

Answer. Partly defendants and partly plaintiff. Jury do not know what year.

JOHN BURROWS, *Foreman.*

Judgment recorded the 23rd day of May, A. D. 1901.

Judgment Record One, page 384.

Judgment Docket —, page —.

37 In the District Court of the First Judicial District, County of Box Elder, State of Utah—Hon. Chas. H. Hart, Judge.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Judgment on Verdict in Open Court 18th Day of May, A. D. 1901.

This action came on regularly for trial. The said parties appearing by their attorneys T. D. Johnson, Esq., counsel for plaintiff, and Riey H. Jones and B. H. Jones, Esq., for defendants. A jury of eight persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant- were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and on their oaths say:

We, the jury empanneled in the above-entitled cause, find the issues joined herein in favor of said defendant and against the plaintiff, no cause of action.

Dated May 18th, 1901.

JOHN BURROWS, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said judgment herein be in favor of said defendant and against the said plaintiff, no cause of action, and that said defendant do have and recover the costs and disbursements incurred in this action, amounting to the sum of — dollars.

Interrogatories Submitted to Jury.

Has the defendant Joseph Dudley been in the open actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer.

Answer. Yes.

If so, during what time?

Answer. From Oct. 20, 1868 till the present.

Under what claim of right, if any, has the said defendant claimed the said land?

Answer. Inheritance—deed destroyed by fire.

If claimed, for what period has he claimed in his own right —. From the date of his lost deed till the present time

And for what period has his predecessors or grantor claimed it?

Answer. From Oct. 20, 1868 till deed was given.

Who has paid the taxes upon the premises described in the complaint, and for what years.

Answer. Partly defendants and partly plaintiff. Jury do not know what year.

JOHN BURROWS, *Foreman.*

Judgment recorded the 23rd day of May, A. D. 1901.

Judgment Record One, page 384.

Judgment Docket —, page —.

38 In the District Court of the First Judicial District, County of Box Elder, State of Utah—Hon. Chas. H. Hart, Judge.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Judgment on Verdict in Open Court 18th Day of May, A. D. 1901.

This action came on regularly for trial. The said parties appearing by their attorneys T. D. Johnson, Esq., counsel for plaintiff, and Ricy H. Jones and B. H. Jones, Esq., for defendants. A jury of eight persons was regularly empanneled and sworn to try said action. Witnesses on the part of plaintiff and defendant- were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and on their oaths say:

We, the jury empanneled in the above-entitled cause, find the issues joined herein in favor of said defendants and against the plaintiff, no cause of action.

Dated May 18th, 1901.

JOHN BURROWS, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said judgment herein be in favor of said defendant- and against the said plaintiff, no cause of action, and that said defendant- do have and recover the costs and disbursements incurred in this action, amounting to the sum of — dollars.

Interrogatories Submitted to Jury.

Have the defendant- S. N. Cook and Geo. Cook been in the open actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer.

Answer. Yes.

If so, during what time?

Answer. From April 4th, 1882, till the present time.

Under what claim of right, if any, *has* the said defendant- claimed the said land?

Answer. By purchase

If claimed, for what period have they claimed in their own right —. Ever since April 4, 1882.

And for what period *has his* predecessors or grantor claimed it?

Answer. From Oct. 20, 1868 till April 4, 1882.

Who has paid the taxes upon the premises described in the complaint, and for what years.

Answer. Partly defendants and partly plaintiff. Jury do not know what year.

JOHN BURROWS, *Foreman.*

Judgment recorded the 23rd day of May, A. D. 1901.
Judgment Record One, page 384.
Judgment Docket —, page —.

39 In the District Court of the First Judicial District, County of Box Elder, State of Utah— Hon. Chas. H. Hart, Judge.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, *vs.* GEORGE COOK ET AL., Defendants.	Judgment on Verdict in Open Court 18th Day of May, A. D. 1901.

This action came on regularly for trial. The said parties appearing by their attorneys T. D. Johnson, Esq., counsel for plaintiff, and Rice H. Jones and B. H. Jones, Esq., for defendants. A jury of eight persons was regularly empanneled and sworn to try said action, witnesses on the part of plaintiff and defendant- were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of thir verdict, and subsequently returned into court, and, being called, answered to their names and on their oaths say:

We, the jury empanneled in the above-entitled cause, find the issues joined herein in favor of said defendants and against the plaintiff, no cause of action.

Dated May 18th, 1901. JOHN BURROWS, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said judgment herein be in favor of said defendant- and against the said plaintiff, no cause of action, and that said defendant- do have and recover the costs and disbursements incurred in this action, amounting to the sum of — dollars.

Interrogatories Submitted to Jury.

Have the defendants Carson F. Wells and C. J. Wells been in the open actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer?

Answer. Yes.

If so, during what time?

Answer. From Nov. 23rd, 1891, till the present time.

Under what claim of right, if any, have the said defendants claimed the said land?

Answer. By purchase.

If claimed, for what period *has he* claimed in *his* own right?

—. From Nov. 23rd, 1891, till the present.

And for what period *has his* predecessors or grantor claimed it?

Answer. From Oct. 20, 1868, till Nov. 23rd, 1891.

Who has paid the taxes upon the premises described in the complaint, and for what years?

Answer. Partly defendants and partly plaintiff. Jury do not know what year.

JOHN BURROWS, *Foreman.*

Judgment recorded the 23rd day of May, A. D. 1901.

Judgment Record One, page 389.

Judgment Docket —, page —.

40 In the District Court of the First Judicial District, County of Box Elder, State of Utah—Hon. Chas. H. Hart, Judge.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, vs. GEORGE COOK ET AL., Defendants.	Judgment on Verdict in Open Court 18th Day of May, A. D. 1901.

This action came on regularly for trial. The said parties appearing by their attorneys T. D. Johnson, Esq., counsel for plaintiff, and Ricy H. Jones and B. H. Jones, Esq., for defendants. A jury of eight persons was regularly empanneled and sworn to try said action. Witnesses on the part of plaintiff and defendant- were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and on their oaths say:

We, the jury empanneled in the above-entitled cause, find the issues joined herein in favor of said defendants and against the plaintiff, no cause of action.

Dated May 18th, 1901.

JOHN BURROWS, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said judgment herein be in favor of said defendant- and against the said plaintiff, no cause of action, and that said defendant- do have and recover the costs and disbursements incurred in this action, amounting to the sum of — dollars.

Interrogatories Submtted to Jury.

Has the defendant George Ward been in the open actual, continuous, notorious, exclusive and hostile possession of the tract described in his answer.

Answer. Yes.

If so, during what time?

Answer. From April 30, 1885, till the present time.

Under what claim of right, if any, has the said defendant claimed the said land?

Answer. By purchase.

If claimed, for what period has he claimed in his own right from April 30, 1885, till the present, and for what period has his predecessors or grantor claimed it?

Answer. From Oct. 20 1868 till April 30, 1885.

Who has paid the taxes upon the premises described in the complaint, and for what years.

Answer. Partly defendants and partly plaintiff. Jury do not know what year.

JOHN BURROWS, *Foreman.*

Judgment recorded the 23rd day of May, A. D. 1901.

Judgment Record One, page 390.

Judgment Docket — page —.

41 In the District Court of the First Judicial District in and for the County of Box Elder, State of Utah.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
GEO. COOK ET AL., Defendants. } No. 406. Certificate.

STATE OF UTAH,
County of Box Elder, } *ss:*

I, the undersigned, clerk of the district court of the first judicial district in and for the county of Box Elder, State of Utah, do hereby certify that the foregoing is a true copy of the judgment rendered in the above-entitled action and recorded in Judgment Book One of said court at pages 384 to 390 inc.

And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and seal of said court, hereto set on this 23rd day of May, A. D. 1901.

[SEAL.] JOSEPH JENSEN, *Clerk.*

42 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE WARD, C. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley, Defendants.

Notice of Intention to Move for a New Trial.

Please take notice that the plaintiff intends to move the court to set aside and vacate the decision heretofore on the 23rd day of May rendered herein, and to grant a new trial in this case, upon the following grounds:

1. Insufficiency of the evidence to justify the decision in favor of the defendants and against the plaintiff.
2. That said decision is against law.
3. On account of errors at law occurring at the trial and excepted to by the plaintiff.

This motion will be made upon the minutes of the court.

CHASE & CHASE AND
T. D. JOHNSON,
Attorneys for Plaintiff.

To the above-named defendants, and their attorneys, R. H. Jones and B. H. Jones.

43 In the District Court of the First Judicial District of Utah in and for the County of Box Elder.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants. } Bill of Exceptions.

Be it remembered, at the trial of the above-entitled cause the following proceedings were had: A jury having been called, the plaintiff objected to empanneling the same, and objected as follows:

Mr. JOHNSON: The plaintiff objects to calling a jury for the trial of this case for the reason that it's a suit in equity, and is a case to be tried by the court, and not a law case to be tried by a jury.

The COURT: If there are any equitable issues, they may be disposed of first, and if there are any law issues they may be disposed of by the jury after.

Mr. JOHNSON: There is no such condition existing here. The complaint is simply an action to quiet title against the defendants. In addition to the objection already made, I want to add this by the answers of the defendants here, they set up separate claims to separate and distinct parcels of the land claimed and set out in the plaintiff's complaint and there are a number of defendants in the action here, and they are attempting to segg*r*egate and to make a separate law action of each individual defendant's claim.

The COURT: If the answer raises issue at law, those issues may be tried by a jury notwishstanding th[illegible]nplaint is framed on the equity side of the court. It may be th[illegible]e is some equitable relief to be tried and determined in this case. If that were so, it wouldn't prevent the defendants from having issues at law tried by a jury. I think a jury may be called in this case and if it shall appear later that it is strictly an equitable suit, the jury may be considered merely advisory.

Mr. JOHNSON: Note an exception.

Mr. JONES: The description in one of these answers is slightly indefinite. We ask leave to amend it.

The COURT: You may do so.

44 Mr. JONES: The amendment to be inserted in the Charles H. Dudley answer: "Commencing 6.72 chains north of the southeast corner of section 27, township 8, north of range 2 west; thence north 89′ 29″ west 20 chains; thence north 3.58 chains; thence south 89′ 29″ east 20 chains; thence south 3.50 chains to point of beginning, containing 6.37 acres. Also commencing at the southeast corner of section 27, tp. 8 N. range 2 west; thence west 20 chains; thence north 3 chains; thence south 89′ 81″ east 30 chains; thence south 2.83 chains to place of beginning, containing 5.28 acres, exclusive of the railway claim.

Mr. JOHNSON: At this time we ask the substitution of the real names of the defendants for the fictitious names of John Doe and Richard Roe, Jane Roe.

The COURT: They may be so added.

The COURT: Examination of the jury for cause by the plaintiff.

Mr. JOHNSON: To be consistent we don't claim any examination.

Mr. JOHNSON: It is stipulated that the plaintiff in this case is the grantee through mesne conveyances from the Central Pacific Railroad Company of the lands set out and described in plaintiff's complaint, and that a patent of the United States Government was duly issued and delivered to the said Central Pacific Railroad Company, bearing date Jan. 20, 1900, conveying the said land described in the complaint with other lands; that the Central Pacific Co. by deed dated Oct. 17, 1895 conveyed said lands to D. P. Tarpey as grantee, and that D. P. Tarpey and wife, as grantors conveyed said land by deed to M. F. Tarpey, bearing date Dec. 8th '95; and that M. F. Tarpey and wife conveyed the said land to the plaintiff in this action by deed bearing date Oct. 17, 1896.

45 It is further stipulated and agreed that no claim of any right or title to or in the right of way of the Central Pacific Railroad Company across the said premises described in said complaint is made by any or either of the defendants herein. It is stipulated that the form of patent issued by the United States Government to said railroad company may hereafter be inserted in the records as well as all of the other conveyances in the stipulation heretofore mentioned.

Copies of said patent and deeds are attached hereto and marked Plaintiff's Exhibits "A," "B," "C," and "D," respectively.

Plaintiff rests.

B. H. JONES: It is hereby stipulated by and between the attorneys and parties to this action that the map of location of the Central Pacific Railroad Company was filed in the office of the Secretary of the Interior on the 20th day of Oct. 1868; that the land described in the complaint is within the ten-mile limit of the grant to the Central Pacific Railroad Company. It is further stipulated that the map marked Def't Ex. 1, is a true and correct representation of the land sued on and that that description drawn by N. P. Anderson properly describes the land in dispute. And that the description in the paper and description in the map agrees.

Mr. JOHNSON: We object to the introduction of the papers in evidence as irrelevant and immaterial.

The COURT: Objection overruled. Papers admitted. Exception noted.

J. J. WARD, being first duly sworn, testified as follows:

Examined by Mr. JONES:

I live at Willard, Box Elder county; am 47 years old; have
46 lived at Willard all my life; am acquainted with the southeast quarter of section 27, township 8, north range 2 west; have been acquainted with it ever since I can remember; have always lived about three-quarters of a mile south of it; the above land is southwest of Willard, in Box Elder county; am acquainted with Charles Dudley; have known him ever since I can remember;

he has lived in Willard until recently; am acquainted with Joseph Dudley, have always known him the same as Charles.

Q. Have Joseph Dudley and Charles Dudley been occupying any of this land?

Mr. JOHNSON: We object as incompetent, immaterial and irrelevant. Under the issues in this case the statute of limitations is attempted to be set up herein against us and under the proof that has been introduced on behalf of the plaintiff, showing the issuance of a patent of the United States to the railroad company, bearing date the 20th of January, 1900, constitutes no defense; and any proof of the occupancy prior to that date or at all, seeing that as much as seven years have not elapsed since the issuance of patent, it becomes wholly immaterial, and the defense attempted to be made herein, cannot prevail, as a matter of law.

The COURT: The objection may be overruled. Exception noted.

Q. Have the Dudleys been occupying any portion of this land?

Mr. JOHNSON: We want to save and objection to all the testimony offered for the purpose of proving or tending to prove an adverse claim.

The COURT: You may have an exception to all the testimony offered on the ground above stated. If there is any other objection, on any other ground, you may make it as you go along. To this one general question that you have raised, you may have an exception to all the testimony against all the defendants.

A. They have (referring to map, Defendants' Exhibit "1"); Charles Dudley occupied the south portion; Joseph a strip
47 next to Charles; the next strip was a portion of the O. H. Dudley estate, which Charles Dudley now holds; they have occupied the three south tracts marked on Exhibit "1" ever since 1886; during that time they have used it in a general way as farmers use land, cut hay off it, used it as farmers generally use land of that character; the land is pasture land, grass land; they have pastured it, and cut hay off it; have lived in Willard since 1868, except from December, 1890, to the spring of 1893; except the years I was absent I know Joseph and Charles Dudley have occupied, and used this land; they have crop-ed it and pastured it every year; this land of the Dudleys is fenced, has been since 1872 or 1873 as a separate inclosure; has been fenced with a wire fence on all sides; prior to the time mentioned this land was inclosed with a fence which inclosed the lands lying south and west of Willard towards the lake, inclosing in one field all the lands in that neighborhood belonging to the settlers; the Dudleys have removed the willows, dug ditches on this land; have had conversations with Charles Dudley with reference to the ownership of the land; it isn't over two years ago when I had it; I don't remember the conversation; he said he owned that part of the quarter. I know George J. Wells, have known him ever since I can remember; am acquainted with the 3 16/100 acres he has been in possession of; it lies immediately north of the Dudley tract; it was inclosed in the joint inclosure

spoken of above; the claims of C. F. Wells and George J. Wells are at present inclosed together; they have been separately inclosed together 6 or 7 years—6.32 acres; have known this land to be used and occupied the same time as the other spoke of, since 1868; it was cropped and pastured every year from that time to the present, I know, except the time I was away; was used as farmers ordinarily use land of that character during all of these years; hay was cut from it and it was pastured; it was at first covered by willows; these have been grubbed out; about half of it has been grubbed out; have talked with C. G. Wells concerning this land, I think every year; in the last conversation prior to this suit he said it was their land.

48 I have been acquainted with the two tracts immediately north of the Wells land—the Ward land—ever since I was a little boy; worked on it until late years, ever since I was big enough to drive a team, every year until I left home; it was then George W. Ward estate, my father's then.

Q. What use has been made of that land since October 20th 1868?

Mr. JOHNSON: I object to any proof of the use of it while it was Geo. Ward estate, or during his lifetime.

Mr. JONES: We'll connect it with the decree.

Mr. JOHNSON: I object as incompetent, irrelevant and immaterial.

Objection overruled; exception taken.

A. It has been cropped and worked every year; cropped and worked and used as that character of land is ordinarily used from 1868 to the present time; the land designated as the Ward land is not pasture land, it is good for raising crops, farming land; it was usually cultivated to corn, wheat and potatoes; these tracts were inclosed in the joint inclosure I spoke of; the piece referred to here and Mr. Cook's are now in the same inclosure, on the north side of Mr. Wells; the Southern Pacific railroad running through this quarter is fenced on both sides of the track; this tract of land of Alfred Ward marked on Exhibit "1" has been fenced as it is to-day, maybe about ten years, I can't say definitely; prior to that they were inclosed in the joint inclosure; this joint inclosure kept out cattle from the lands inclosed; the Oregon Short Line railroad just cuts off the northeast quarter of the quarter in dispute; it is fenced on both sides; the west fence of the railroad fences in the east portion of this land; I have know- the Cook lands shown on the exhibit the same period I have known father's farm; the George Cook land, east of the Southern Pacific, is farming land; a little bit is grass land; it has been farmed 37 pears; wheat, corn and potatoes have been raised upon it; he has this piece fenced in with the rest of his land north of this; I have known the S. N. Cook land, which is west of the Southern Pacific track and north of the Geo.

Ward 2.32 acres, the same period as the others; it has been
49 cultivated, pastured and cropped each and every year from 1868 to the present time, that is fenced in with the rest of the Geo. Cook and the S. N. Cook's tracts of land that extends

further on to the north; there is a fence between Geo. Ward and S. N. Cook west of the Southern Pacific railroad, north of the Geo. Ward land; each and every tract of land marked upon Defendants' Exhibit "1," on the southeast quarter of the southeast quarter of sec. 27, township 8, north range 2 west, has been used as farmers ordinarily use such lands each and every season from October 12, 1868, down to the present time, of my own knowledge, except those two years I was away; it has been fenced so as to prevent cattle from coming upon it, and has been occupied by these claimants or their predecessors; John Jones owned the Cook place prior to his occupation; the Geo. Ward land west of the S. P. track is all meadow land at present; they have cut hay from it and pastured it each and every year down to the present; it is separately fenced by itself; have had conversations with Geo. Ward with reference to this 3.32 acres; have had conversations with him about it every year since 1882; he made arrangements with me to cut his hay; he don't reside there; I've tended to it, cut the hay, seen to it for him; I cut the crop on shares; Mr. Ward never paid any rent for the land; none of these defendants ever paid any rent; have had conversations with S. N. Cook with regard to the —.36 acre marked on Exhibit "1;" he said he bought that land of John D. Jones, and he owned it; have had conversations with Geo. Cook about the 1.37, acres on the north; he said the same thing; that he bought it of John D. Jones, and that he owned it.

It was admitted by all the parties hereto, that the southeast quarter of the southeast quarter of section 27, township 8, north range 2, west, being the land in dispute in this action, was regularly and legally assessed for taxes as follows: 1891 against D. P. Tarpey, 1892 against D. P. Tarpey, and for each of said years paid by him; 1893 against D. P. Tarpey and sold that year for the said taxes to Moroni Ward; 1894 and 1895 against Moroni Ward and paid by him; in 1895 said Tarpey redeemed said land from the tax sale of 1893, and at that time he paid the taxes for the years 1893–'4–'5, with the interest and costs; in 1896 said lands were regularly and legally assessed to Moroni Ward, and were sold to Box Elder county for said taxes; in 1897 and 1898, the said lands were regularly and legally assessed to the Toltec Ranch Company, but was not paid by any one.

JOHN A. EDWARDS, being duly sworn, testified as follows:

Examined by Mr. JONES:

I am the county assessor of Box Elder county; I have the books of said assessor's office in my charge; I have examined the assessment-rolls in said office for the year 1890, and the years prior thereto; they do not show that the land in dispute or any portion thereof was assessed for taxes for said year or any year prior thereto against either the Southern Pacific Railroad Company, or D. P. Tarpey, or any of the defendants; there is in the books of said office for said years no desciption of the said lands in dispute.

JOSEPH S. DUDLEY, being duly sworn, testified in behalf of the defendant and intervenor, as follows:

I am one of the defendants in this action; am 49 years old; with the exception of two years have lived at Willard as long as I can remember.

(It was admitted by the plaintiff that this witness would testify in substance and effect the same as the witness J. J. Ward; subject however to the same objection, as hereinbefore set out as made to the admission of the testimony of said witness, which said
51 objection was by the court overruled, and to which ruling of the court the plaintiff duly excepted.

Continuing the witness Dudley, further testified:

Am acquainted with the land in dispute; my own claim is that I have owned that land since '72, occupied and improved it; have never paid the railroad company or D. P. Tarpey, or any one else any rent for it; my claim to that land has been ownership, possession; I obtained the land from O. H. Dudley; as to Charles Dudley's claim, he has been in possession of the one on the south since '70; the one on the north he has been in possession of since '98.

Q. Who was in possession of it prior to 1898?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled, and exception taken.

A. Oliver H. Dudley the father of Charles Dudley.
Q. How long was Oliver Dudley in possession of that land?

Objected to on the grounds above stated. Objection overruled, and exception taken.

A. Since '60 or '61.
51½ Q. That is Charles Dudley's father?
A. Yes, sir.
Q. Is Oliver Dudley dead?
A. Yes, sir.
Q. When did he die?
A. He died in '98.
Q. Charles Dudley was his son?
A. Yes.
Q. Did he go in as heir of your father?

Mr. JOHNSON: I object as a legal conclusion.
The COURT: Objection sustained.

Q. Do you know how he went into possession of the property?
A. Yes.
Q. You may explain how?

Mr. JOHNSON: We object to that as incompetent, irrelevant and immaterial.
The COURT: The answer may be taken.
Exception noted.

A. Possession.

Q. Did he go in——
A. He went in by possession.
Q. Who put him in possession, do you know?

Mr. JOHNSON: May I have an exception to all this testimony?
The COURT: Yes.

A. Oliver H. Dudley put him in possession before his death.
Q. How long before his death?
A. Three or four days.
Q. Give him a deed.
A. No.
Q. What claim did Oliver H. Dudley have to that land from 1898 back to 1868.

Mr. JOHNSON: Same objection. He's attempting to tack.
The COURT: Objection overruled.
Exception noted.

52 A. Yes, sir; he claimed the land.
Q. What was his claim?
A. I don't know as I understand.
Q. Do you know by what right, if any, your father claimed that land?
A. He bought it in the first place.
Q. Did he obtain a deed?
A. Yes sir.
Q. Where is that deed?
A. The deed is destroyed—burned.
Q. Was it recorded?
A. No sir.
Q. From whom did he obtain that deed?
A. A man by the name of Lish.
Q. What did he pay for the land?
A. $60.
Q. You know that that deed is destroyed?
A. Well, we had a fire and everything was burned in the house.
Q. Did you have the deed prior to that time?
A. We had the deed prior to that time.
Q. You've never been able to find it since?
A. No.
Q. The deed is either lost or destroyed?
A. Destroyed.
Q. Your father paid $600?
A. Yes sir.
Q. To Lish?
A. Yes sir.
Q. That included the strip above it too?
A. That included the strip clear through, land lying east of this.
Q. Your father cropped it every year for those years?
A. Yes.

Q. How long has Charles H. Dudley had the south por-
53 tion, if he has ever had it?

A. He's had the south portion ever since '70.
Q. How long have you had the portion immediately north of that?
A. Since '72.
Q. What is Charles Dudley's claim to the south portion?
A. Charles *claim* in by possession. He's owned it ever since '70.
Q. Do you ever know of this property being given in to the assessor for assessment and taxes.
A. Yes sir.
Q. Have you ever given it?
A. Yes sir.
Q. In what years?

Mr. JOHNSON: I object as immaterial.
The COURT: Whether it would have a bearing upon his claim of ownership—on the tax proposition, it may be sustained.

Q. Have you ever paid taxes on this portion of the land?
A. Yes, sir.
Q. Have you always paid the taxes that have been levied and assessed against you?
A. Yes.
Q. For how many years have you paid taxes on this land?
A. Ever since '72.
Q. Has your brother ever paid taxes on his south 5 acres and twenty-seven-hundredths?
A. Yes sir.
Q. Ever since how long?
A. Ever since '70.
Q. Did Oliver Dudley ever pay taxes on the north 6.27 acres immediately north of yours?
A. Yes sir ever since '60.

54 Cross-examination:

I went on this land, what I claim, in 1872; was 21 at the time; my father gave it to me.
Q. What claim of right or title did you have to assert in that land since 1872.
A. Possession.
Q. You've had possession, but if I were to loan you my horse you'd have possession, and still you wouldn't claim to own him would you?
A. No, I don't think I would.
Q. Then what kind of claim of right have you since that time asserted that you own that land?
A. I stated by possession.
Q. Is that all?
A. That's all.
Q. Simply because you were in possession, therefore your land?
A. Because I had been in possession and paid taxes on it every year.

Q. Do you have any other claim than those two facts you have stated, upon which you base your claim of ownership to that land?

A. Why yes, the right of limitation in my favor.

Q. That is a legal proposition. What I am getting at is, what other fact save the fact that you say you have been in possession and have paid taxes do you base your claim of ownership in that piece of land over there?

A. Nothing more than possession.

Defendants offered in evidence the decree of court distributing the estate of George Ward, deceased.

Objected to by plaintiff as irrelevant and immaterial.

Objection overruled, and plaintiff duly excepted. Received in evidence and marked Defendants' Exhibit "O."

55 Defendants offered in evidence deed, dated April 9, 1896, from Moroni Ward and wife to Alfred Ward.

Objected to as irrelevant and immaterial. Objection overruled and exception taken. Received in evidence and marked Defendants' Exhibit "2."

Defendants offered in evidence deed from John D. Jones to Geo. Cook and Samuel N. Cook dated April 4th, 1892.

Objected to as irrelevant and immaterial. Objection overruled and exception taken. Received in evidence and marked Defendants' Exhibit "3."

Defendants offered in evidence deed from Lyman B. Wells and wife to Geo. J. Wells and Carson F. Wells, dated Nov. 23rd, 1891. Objected to as irrelevant and immaterial; objection overruled, and exception taken. Received in evidence and marked Defendants' Exhibit "4."

Defendants offered in evidence deed from Richard T. Ward and wife to George Ward, dated April 30, 1885. Objected to as irrelevant and immaterial. Objection overruled, and exception taken. Received in evidence and marked Defendants' Exhibit "5."

S. N. Cook, being duly sworn, testified as follows:

Examined by Mr. Jones:

There was a house on the quarter in dispute in this suit as early as 1869 or '70; my claim to the — .36 of an acre of land which I claim in this suit is, my father and I bought that in connection with other land from John D. Jones that lies north and east of it; the deed conveying it has been offered in evidence (Exhibit "3") have never paid rent to any one for it; have never disavowed ownership in it; have always claimed to own it since I purchased it; have paid taxes on it ever since we possessed it; so has Geo. Cook on his.

56 (It was also admitted that this witness would testify in substance and effect the same as witness J. J. Ward, subject however to the same objection as hereinbefore set out as made to, the admission of the testimony of said witness, which objection was overruled, to which ruling the plaintiff duly excepted.)

LYMAN B. WELLS, being first duly sworn, testified, as follows:

Examined by Mr. JONES:

Am 70 years old; have resided at Willard since '61; am acquainted with the land in dispute; have been since '52; I was in possession of a part of it at the time the Central Pacific built its road through this tract; the railroad company paid me $70.00 for the damage done to my land, or for a right of way; I know it paid some of the other occupants of this particular land besides myself.

(The same admission was made respecting the testimony of this witness, as made respecting the other hereinbefore contained, with the same objection, ruling and exception.)

57 J. J. WARD, recalled, testified as follows:

Examined by Mr. B. H. JONES:

Q. Do you know what farm in your father's estate was commonly known as the South farm?

Mr. JOHNSON: We object as incompetent, irrelevant and immaterial, and further object that any such decree of distribution wouldn't distribute anything under any such description as that.

B. H. JONES: We offer the inventory and appraisement.

Mr. JOHNSON: We don't make any question about the identification of the papers, but we object to both the papers on the ground stated.

B. H. JONES: All we claim for it is simply this: under our statute any kind of a written conveyance is color of title. We also offer the map from the recorder's office of this State, showing parcel No. 1, and parcel No. 2.

The COURT: This map is not referred to in this instrument.

Mr. B. H. JONES: Another thing, it shows the openness of the claim, having it administered on and distributed.

58 The COURT: You may proceed with the testimony and see what it is.

Exception noted.

Q. State whether or not you were acquainted with what is known as the South farm in the Ward estate?

A. Yes.

Q. Did that include——.

Mr. JOHNSON: Don't ask leading questions.

Q. What did that include.

A. That included this land in the Ward estate.

Mr. JOHNSON: This all goes in under my objection.

Q. Which land do you mean when you say this land?

A. It included what is in dispute in section 27. Also in section 26.

Q. Calling your attention to Defendants' Exhibit 1, did I understand you to say that the 3.32 acres and the Alfred Ward 6.12 acres in the southeast quarter of the southeast quarter of 27, 8, 2 west.

A. Yes sir.

Q. Was that so-called South farm parcelled out?

A. Yes sir.

Q. Do you know what the numbers were?

A. Yes sir.

Q. Well then, what was the George Ward 3.32 acres, what number of a parcel?

A. It was known as No. 1 of the South farm.

Q. What was the Alfred Ward 6.12 acres known as?

A. Parcel 2 of the South farm.

Defendants rest.

59 The above and foregoing testimony, with the exhibits hereto attached is all the evidence taken, heard and considered at the trial of said causes.

Mr. JOHNSON: The plaintiff moves the court for judgment in this case in favor of the plaintiff, and against the defendants and each of them on the following grounds:

1. The uncontradicted evidence in the case shows that the land described in the complaint, and in dispute in this action is contained in the grant of Congress to the Central Pacific Railroad Company.

2. That the evidence wholly fails to show when the said lands were surveyed by the Government of the United States, and wholly fails to show when the said lands were set apart or set off to the company at any time prior to the 4th day of February, 1884, when it appears from the evidence in this case that the said lands were selected by the company under its grant.

3. That the uncontradicted proof in the case shows that patent for the said land was issued by the United States Government and delivered to the railroad company for the said lands on the 20th day of February, 1900, and that by reason of the matters proved as herein stated and by reason of the failure of the defendants upon the questions herein indicated, the plaintiff in this action is entitled to judgment, and the defense set up by the defendants by way of the plea of the statutes of limitations is unavailing, and no defense to this action.

The COURT: The motion may be denied. The court will submit to the jury the question of the issues raised by the answers—title in defendants by adverse possession.

To which ruling of the court plaintiff duly excepted.

60 In the District Court of the First Judicial District of the State of Utah in and for Box Elder County.

TOLTEC RANCH COMPANY, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.

Instructions of Court to Jury.

The court charges the jury as follows:

I. Plaintiff alleges in its complaint that it is a corporation organized and existing under and by virtue of the laws of the State of Utah, that plaintiff is now and for a long time has been the owner in fee and entitled to the possession of all that certain real estate situate in Box Elder county, State of Utah, and described as follows: The southeast quarter of the southeast quarter of section 27, township 8, north range 2 west, Salt Lake meridian U. S. survey.

II. The defendants answer said complaint, and all the defendants admit the corporate existence of the plaintiff company, and each and all deny that plaintiff is or ever has been the owner in fee or entitled to that tract or portion of land set up and claimed respectively by the defendants in their separate and several answers: For a further defense each defendant alleges that he and his grantors and predecessors have claimed possessed, and owned the respective tracts claimed by the several defendants and comprising in all the land described in the plaintiff's complaint, and that plaintiff's cause of action is barred by the statute of limitations as
61 provided by sections 2856 to 2872 inclusive of the Revised Statutes of Utah.

III. You are instructed that under the stipulation of counsel and the evidence in this case the legal or record title to the premises in dispute is in the plaintiff in this case. The question for you to determine is whether the plaintiff is barred by the statute of limitations or adverse possession to the said premises, or respective portions thereof claimed by the defendants respectively. If adverse possession in the defendants and each of them is made out and proved as hereinafter more fully explained, then the plaintiff cannot recover.

IV. The burden of proof is on the defendants to make out their defence of possession by a preponderance of the evidence.

V. Section 2861 provides: In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.

VI. Section 2862 provides: Whenever it shall appear that the occupant or those under whom he claims entered into possession of

the property under claim of title exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim for seven years, the property so included shall be deemed to have been held adversely, except that when the property so included consists of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

62 VII. Section 2863 provides: For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or judgment or decree land shall be deemed to have been possessed and occupied in the following cases:

1. When it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupants.
4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining country shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

VIII. Section 2864 provides: Where it appears that there has been an actual, continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, shall be deemed to have been held adversely.

IX. Section 2865 provides: For the purpose of constituting adverse possession by a person claiming title not founded upon a written instrument judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.
3. Where labor or money has been expended upon dams,

63 canals, embankments, aqueducts, or otherwise for the purpose of irrigating said lands amounting to the sum of five dollars per acre.

X. Section 2866 provides: In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party or persons their predecessors and grantors have paid the taxes which have been levied and assessed upon such land according to law.

XI. The possession of the occupant must be in derogation of the title of the owner. Claim of ownership is necessary and the occupant must claim to be the absolute owner of the property in order to constitute title by adverse possession. Occupancy of land by per-

mission or sufferance of the owner would not constitute an adverse possession.

XII. The possession of the defendants and each of them in order to be adverse must have been open, notorious, actual, continuous, hostile, exclusive, and must be held adversely to the interest of the plaintiff and its predecessors.

XII½. Prior to 1884, no taxes were required to be paid in order to establish adverse possession.

XIII. By a preponderance of the evidence is meant the greater weight of the evidence, that which is more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although all other things being equal, it may be so determined. If you find a conflict in the evidence you should reconcile it, if you can, upon any reasonable theory, if you cannot do so then you must determine what you believe.

XIII½. The court charges you that these instructions should be construed together and as a whole. Each instruction should be read and understood with reference to and as a part of the entire charge and not as though each instruction were intended to present the whole law of the case.

64 XIV. You are the sole judges of the weight of the evidence and of the facts and of the credibility of the witnesses. You are instructed that three-fourths of your number concurring you may find a verdict in this case. Upon retiring, you will select a foreman, and if all of you agree upon a verdict your foreman will sign the same; if three-fourths of your number and less than the whole agree upon a verdict, those agreeing upon the same will sign the verdict agreed upon.

Mr. JOHNSON: Comes now the plaintiff in the above-entitled action and excepts to the refusal of the court to submit the special interrogatories requested on behalf of the plaintiff to the jury for its answer, numbered 1 to 11 inclusive: Excepts to the refusal of the court to submit each and every of said special interrogatories, which said interrogatories requested are as follows:

1. When was the land in dispute and described in the complaint surveyed.

2. When did the defendant George Cook first claim title to the land set out in his answer.

3. When did S. N. Cook first claim title to the land set out in his answer.

4. When did Alfred Ward first claim title to the land set out in his answer.

5. When did George Ward first claim title to the land described in his answer.

6. When did G. J. Wells first claim title to the land described in his answer.

7. When did C. F. Wells first claim title to the land described in his answer.

8. When did Joseph Dudley first claim title to the land described in his answer.

9. When did Charles Dudley first claim title to the land described in his answer.

10. What if anything was the claim of right under which and upon which the defendants base their several claims.

11. Who has paid the taxes legally assessed upon the lands in dispute and for what years.

65 The plaintiff excepts to that certain instruction given by the court to the jury of its own motion numbered 3, and especially to that portion thereof in which the court declares the question which you are to determine is whether the plaintiff is barred by the statute of limitations, or adverse possession to said premises or the respective portions thereof claimed by the said defendants respectively in that the court thereby submits to the jury as a matter of fact to be determined by the jury *of* the defense set up by the defendants and each of them; and excepts to that portion of the instruction in which the court says; "If adverse possession in the defendants and each of them is made out and proved as hereinafter explained, then the plaintiff cannot recover," in that it submits to the jury the determination of the issue of adverse possession as a matter of fact, whereas the same is a question of law in this case to be decided by the court.

Plaintiff excepts to the instruction given by the court, numbered 5, and each and every portion thereof, in that it submits to the jury the determination of the issues to be determined in this action as matters of fact, whereas the same are questions of law to be determined by the court.

Plaintiff excepts to the instruction numbered 6, and each and every portion thereof, in that it submits to the jury for its determination as questions of fact matters which under the proof in this case are questions of law to be decided by the court, and that there is no question of fact in this case to be submitted to the jury, and to which the said instruction properly relates.

Excepts to the instruction numbered 8 (7), given by the court to the jury in that it submits to the jury questions of fact to be determined by it, whereas under the proof in this case there is no issues of fact properly submitted to the jury, that the same are questions of law to be decided by the court.

Excepts to the instruction 8, in that said instruction defines under what conditions lands may be held adversely, as therein referred to, to be determined by the jury in this case as a matter of fact, whereas under the proof in this case, the questions to be determined are matters of law to be decided by the court.

66 Excepts to the instruction numbered 9, for the reason that the definition therein given of adverse possession has no application to the facts proven in this case, and in submitting to the jury questions in this case as matters of fact, whereas the same, under the proofs herein, are questions of law to be decided by the court.

Excepts to the instruction numbered 10, in that it submits to the jury as a question of fact to be determined, whether or not the occupation and claim of the said defendants has been for the period of time by themselves or their predecessors, and the payment or non-

payment of any taxes that may have been levied, to be decided by the jury as questions of fact, whereas under the proof in this case, it is a question of law to be decided by the court, as to the right of the defendants to set up and maintain the defense under the statute of limitations.

Excepts to instruction numbered 11, for the reason that it has no application to the facts proven in this case, in that it submits to the jury questions of fact to be decided by it, whereas the questions, under the proofs in this case to be decided, are matters of law and for the court.

Excepts to instruction numbered 12 in this, that the court instructs the jury that if the possession of the defendants, or either of them shall be proven to be open, notorious, actual, continuous, hostile, exclusive, and held adversely to the interest of the plaintiff or its predecessors, that under the proofs in this case the said defendants are entitled to recover in this action, whereas under the proofs in this case the defendants are not entitled to recover and the determination of the issues herein are matters of law to be decided by the court.

67 Excepts to the 13th instruction, in that it submits the questions and issues under the proofs in this case as matters of fact to be determined by the jury, whereas under the proofs the issues herein are questions of law to be decided by the court.

Excepts to the 14th instruction in that the court submits to the jury for its decision the issues in said case upon the evidence offered in said case as matters of fact, whereas and in truth the questions to be decided herein under the proofs in this case are questions of law for the court.

Excepts to each and every of the foregoing instructions excepted to in addition to the exceptions herein stated, that each and every and all of said instructions are contrary to law, and that under the proof in this case the plaintiff is entitled to recover, and as a matter of law the defendants and each of them have failed to introduce any evidence herein under which the question of the claim made by them of holding adversely is submissible to the jury.

68 PLAINTIFF'S EX. "A."

Entered in Tract Book Jan. 29, 1900. F. C. R.

Patent No. 107. Central Pacific Railroad lands, primary limits, Salt Lake City land district, Utah. 4–446.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved July 1st, 1862, as amended by the act of Jul- 2, 1864, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes" and the act of July 3, 1866, authority is given to the Central Pacific Railroad Company, to con-

struct a railroad and telegraph line under certain conditions and stipulations as expressed in said act, and provision is made for granting to said company "every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof, and within the limits of twenty miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," mineral lands excepted and

Whereas, an official statement bearing date November 3, 1869, from the Secretary of the Interior has been filed in this office showing that the line of said railroad and telegraph from Ogden in the Territory of Utah to Sacramento city, State of California, has been constructed and fully completed and equippped in the manner prescribed by the act aforesaid and

Whereas certain tracts of land in the State of Utah have been listed under the acts aforesaid, by the duly authorized land agent of the said Central Pacific Railroad Company as shown by his original list approved by the local land officers on file in this office, and

69 Whereas the said tracts of land lie coterminous to the constructed line of road and are particularly described, as follows, to wit:

North of base line and west of Salt Lake meridian, State of Utah. Township eight range two.

The southeast quarter of the southeast quarter of section twenty-seven, containing forty acres.

Township nine, range two.

The northeast quarter of section fifteen, containing one hundred and sixty acres.

The said tracts of land as described in the foregoing make the aggregate area of two hundred acres (200).

Now know ye that the United States of America, in consideration of the premises and pursuant to the said acts of Congress have given and granted and by these presents do give and grant unto the said Central Pacific Railroad Company, and to its assigns, the tracts of land listed as aforesaid and described in the foregoing; yet excluding and excepting from the transfer by these presents "all mineral lands" should any such be found to exist in the tracts described in the foregoing, but this exclusion and exception according to the terms of the statutes "shall not be construed to exclude coal and iron lands."

To have and to hold said tracts with the appurtenances thereof unto the said Central Pacific Railroad Company, and to its successors and assigns forever.

In testimony whereof, I, William McKinley, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this the twentieth day of January in the year of our Lord, one thousand and nine hun-

dred, and of the Independence of the United States the one hundred and twenty-fourth.

By the President:

WILLIAM McKINLEY.

[SEAL.]

F. M. McKEAN, *Secretary.*

C. H. BRUSH,
Recorder of the General Land Office.

Recorded in vol. 26, pages 201 to 203 inclusive.
Filed for record and recorded May 23, 1901, at 2.30 p. m.

70 PLAINTIFF'S EXHIBIT "B."

To all to whom these presents shall come:

The Central Pacific Railroad Company, a corporation, existing under the laws of the State of California, and of the United States, and the Metropolitan Trust Company of the City of New York, a corporation existing under the laws of the State of New York, trustee under the indenture of mortgage or deed of trust from the said Central Pacific Railroad Company to Charles Crocker and Silas W. Sanderson, trustees, dated 1st October 1870, and trustees under the indenture dated 4th September 1890, between the said Central Pacific Railroad Company, J. O. B. Gunn and William E. Brown, heretofore trustees under said indenture of mortgage or deed of trust of 1st October, 1870, and the Southern Pacific Company, in respect to the extension of bonds, secured by the said indenture of mortgage or deed of trust of 1st October, 1870, send greeting:

Whereas, in and by said indenture of mortgage or deed of trust of 1st October, 1870, it was provided that all of the lands therein conveyed and mortgaged should be under the sole and exclusive management and control of the said Central Pacific Railroad Company, with full power and authority in it to make contracts for the sale of the same, at such price, on such credit or terms of payment, and upon such other conditions as should be agreed to by the parties of the first and second part to the said indenture of mortgage or deed of trust, and as should seem to the said parties best calculated to secure a payment in full of all the bonds issued as therein provided, until entry or foreclosure by the trustees as therein provided.

And whereas, the said Central Pacific Railroad Company has contracted for the sale of the land hereinafter described to D. P. Tarpey, for the sum of seven hundred and sixty-nine (769) dollars, and such contract for the sale of said land, at the price and upon the credit or terms of payment and conditions contracted for, has been agreed to by the said Central Pacific Railroad Company and Metropolitan Trust Company of the City of New York, to which companies it has seemed best calculated to secure the payment in full of all the bonds issued, as in said indenture of mortgage or deed of trust provided:

And whereas the whole of the purchase-money of said land has been paid to the Metropolitan Trust Company of the City of New

York, in cash or in bonds secured by the said indenture of mortgage or deed of trust, or in overdue coupons.

Now therefore, in consideration of the premises, and the said sum of seven hundred and sixty-nine (769) dollars, the receipt whereof in cash, or in such bonds or coupons, is hereby acknowledged, the said Central Pacific Railroad Company and the said Metro-
71 politan Trust Company of the City of New York, trustee upon the trust expressed in the indenture hereinbefore mentioned, have granted, bargained, sold and conveyed, and hereby grant, bargain, sell and convey to the said D. P. Tarpey, and his heirs and assigns, the following-described tracts of land situate, lying and being in the counties of Weber and Box Elder, Territory of Utah, to wit:

Southeast quarter of southeast quarter (S. E. ¼ of S. E. ¼) of section twenty-seven (27) in township eight (8) north range two (2) west

according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging, and reserving all claim of the United States to the same as mineral land.

To have and to hold the aforesaid premises to the said D. P. Tarpey, his heirs and assigns to his and their use and behoof forever.

In witness whereof, each of the parties hereto have caused these presents to be signed by its president or vice-president to be sealed with its corporate seal, and such seal to be attested by its secretary or assistant secretary, this seventeenth day of October, 1895.

ISAAC L. REQUA,
President C. P. R. R. Co.

[SEAL.]
Attest: W. M. THOMPSON,
Secretary C. P. R. R. Co.

Witness:
BENJ. F. TUTTLE.

CHAS. M. JESSUP,
2nd Vice-President Metropolitan Trust Co.

Attest: BEVERLY CHEW,
Secretary Metropolitan Trust Co.

Witness:
JOHN TELFORD.

72 STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

On this seventeenth day of October, 1895, before me, Benj. F. Tuttle, a commissioner of deeds for the Territory of Utah, to reside in the State of California, duly appointed, commissioned and qualified, and residing in the city and county of San Francisco, in the State of California, personally appeared Isaac L. Requa, personally known

to me to be the president of the Central Pacific Railroad Company, the corporation that executed the foregoing instrument, and to be the person who subscribed the same as such officer; and also personally appeared W. M. Thompson, personally known to me to be the secretary of the said corporation, and to be the person who subscribed the said instrument as such officer, and each acknowledged to me that the said corporation, and he as such officer thereof, executed the foregoing instrument freely and voluntarily, and for the uses and purposes therein mentioned. And I further certify that I know the seal affixed to the said instrument to be the corporate seal of the said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year in this certificate first above written.

[SEAL.] BENJ. F. TUTTLE,

A Commissioner of Deeds for the Territory of Utah, Residing in the City and County of San Francisco, State of California.

73 STATE OF NEW YORK, } ss:
City and County of New York, }

On this 30th day of October in the year eighteen hundred and ninety-five, before me, Joseph B. Braman, a commissioner of deeds for the Territory of Utah, in and for the State of New York, resident in said city of New York, personally appeared Charles M. Jessup and Beverly Chew, personally known to me to be the second vice-president and secretary, respectively, of the Metropolitan Trust Company, one of the corporations described in and that executed the within and annexed instrument, and they each acknowledged to me that such corporation executed the same. And the said Charles M. Jes-up and Beverly Chew, second vice-president and secretary respectively as aforesaid, being personally known to me to be such officers of said trust company, and the individuals described in and who executed said instrument as such officers of said trust company, each severally and personally then and there further acknowledged to me that the seal affixed to said instrument at the signature of said trust company is the corporate seal of said trust company, and that it was so affixed and attested, and said instrument executed by them in pursuance of the authority of the board of trustees of said trust company as the free and voluntary act and deed of said trust company and of themselves and each of them as its said respective officers freely and voluntarily, and for the uses and purposes therein mentioned and set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate last above written.

JOSEPH B. BRAMAN,

Commissioner of Deeds for the Territory of Utah in and for the State of New York, Resident in said City of New York.

[SEAL.] *Offices: Equitable Building,* 120 *Broadway, also* 1274 *Broadway, New York City.*

Indorsed: Territory of Utah, County of Box Elder, ss. Filed for record and recorded November 27, 1895, at 11.15 a. m. in Book "P" of Deeds, page 558. Hyrum Standing, recorder.

74 PLAINTIFF'S EX. "C."

This indenture, made the twenty-eighth day of December, in the year of our Lord, one thousand eight hundred and ninety-five, between D. P. Tarpey and J. A. Tarpey, his wife, both of Salt Lake City, Utah, parties of the first part, and M. F. Tarpey of Alameda, California, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of ten dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do grant, bargain, sell and convey to the said M. F. Tarpey, and his heirs, and assigns, the folowing-described tracts of land, situate, lying and being in the county of Box Elder of Utah, to wit:

The southeast quarter of the southeast quarter of section 27, township 8 north of range 2 west Salt Lake meridian and base, according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging, inclusing all homestead rights, reserving however, all claim of the United States to the same as mineral land. And the said J. A. Tarpey hereby covenants and agrees to and with the said party of the second part, that she has a perfect right to sell and relinquish her right of dower in the land aforesaid, and in consideration of the premises, and of the sum of one dollar to her in hand paid by the party of the second part, she has released, relinquished and conveyed, and by these presents does relinquish, release and convey unto the said party of the second part, his heirs and assigns forever, all rights or privileges of dower of, in or to said premises, and every part thereof.

To have and to hold the aforesaid prem-ses to the said M. F. Tarpey, his heirs and assigns, and to his and their use and behoof forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

D. P. TARPEY. [SEAL.]
J. A. TARPEY. [SEAL.]

Witness:
C. LOWE.

75 UNITED STATES OF AMERICA:

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

Be it remembered that on the twenty-eighth day of December, 1895, before me C. Lowe, a notary public in and for the county of Salt Lake, personally appeared the within-named D. P. Tarpey and

J. A. Tarpey, his wife, whose names are subscribed to the annexed instrument, as parties thereto, personally known to me to be the parties described in, and who executed the annexed instrument, as parties thereto, who each of them acknowledged to me that they, each of them respectively executed the same freely and voluntarily, and for the uses and purposes therein mentioned, and that in signing and acknowledging the foregoing instrument they each thereby expressedly convey all homestead rights in and to the premises hereinbefore described.

And the said J. A. Tarpey, wife of the said D. P. Tarpey, having been by me first made acquainted with the contents of said instrument, acknowledged to me on examination, apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same; and that in signing and acknowledging the annexed instrument, she thereby expressly conveys all her right of dower, and homestead right, in and to the premises hereinbefore in this instrument described.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Salt Lake City the day and year first above written.

CLINTON LOWE,
Notary Public.

Indorsed: State of Utah, county of Box Elder. Filed for record and recorded September 4th, 1896, at 3.35 o'clock p. m., in Book "A" of Deeds, page 151. Hyrum Standing, county recorder.

76 PLAINTIFF'S EXHIBIT "D."

This indenture made this seventeenth day of October, in the year of our Lord one thousand eight hundred and ninety-six, between M. F. Tarpey, and E. M. Tarpey his wife, both of Alameda, California, parties of the first part, and the Toltec Ranch Company, a corporation, the party of the second part, *witnesseth:*

That the said parties of the first part, for and in consideration of the sum of ten dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do grant, bargain, sell and convey to the said Toltec Ranch Company, and its heirs and assigns, the following-described tract of land, situate, lying and being in the county of Box Elder, State of Utah, to wit: The southeast quarter of the southeast quarter of section twenty-seven, in township eight, north of range two, west, Salt Lake base and meridian, according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging; including all homestead rights. Reserving however, all claims of the United States to the same as mineral land. And the said E. M. Tarpey hereby covenants and agrees to and with the said party of the second part, that she

has a perfect right to sell and relinquish her right of dower in the land aforesaid, and in consideration of the premises, and of the sum of one dollar to her in hand paid by the party of the second part, she has released, relinquished and conveyed, and by these presents does release, relinquish and convey, unto the said party of the second part, its heirs and assigns forever, all rights or privileges of dower, of, in or to said premises, and every part thereof.

To have and to hold the aforesaid premises to the said Toltec Ranch Company, its heirs and assigns, to its and their use and behoof forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

M. F. TARPEY. [SEAL.]
E. M. TARPEY. [SEAL.]

Witness:
E. H. THAUP.

77 UNITED STATES OF AMERICA:

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Be it remembered that on this seventeenth day of October, 1896, before me, E. H. Thaup, a notary public in and for the city and county of San Francisco, personally appeared the within-named M. F. Tarpey and E. M. Tarpey, his wife, whose names are subscribed to the annexed instrument, as parties thereto, personally known to me to be the same parties described in, and who executed the annexed instrument, as parties thereto, who each of them acknowledged to me that they, each of them respectively, executed the same freely and voluntarily, and for the uses and purposes therein mentioned, and that in signing and acknowledging the foregoing instrument they each thereby expressly convey all homestead rights in and to the premises hereinbefore described.

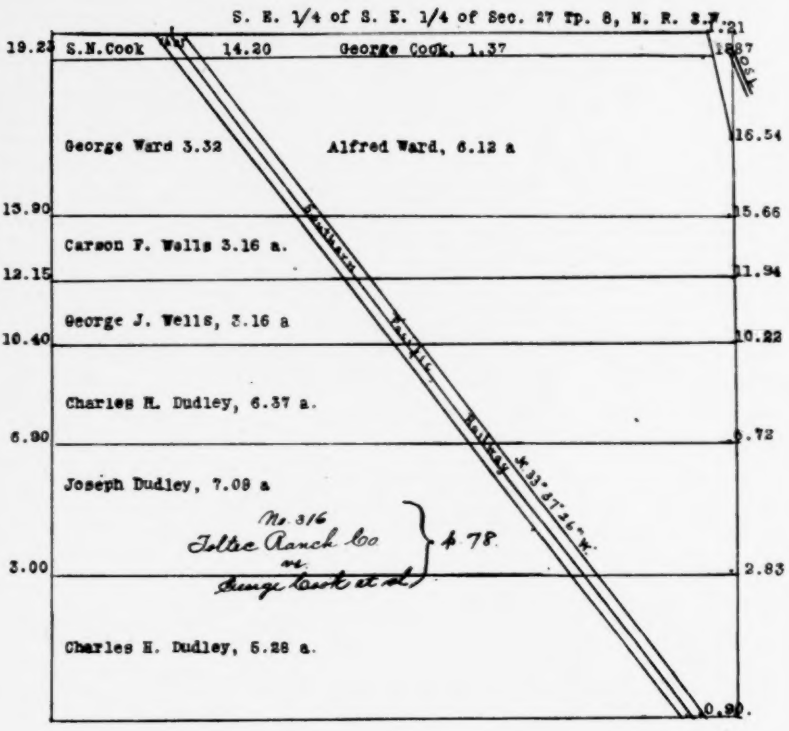
And the said E. M. Tarpey, wife of the said M. F. Tarpey having been by me first made acquainted with the contents of said instrument, acknowledged to me on examination, apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same; and that in signing and acknowledging the annexed instrument, she thereby expressly conveys all her right of dower, and homestead right, in and to the premises hereinbefore in this instrument described.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in said city and county of San Francisco, the day and year first above written.

E. H. THAUP,
Notary Public.

[SEAL.]

Defendants Exhibit "1".



Endorsed: State of Utah, county of Box Elder, *ss.* Filed for record and recorded October 21, 1896, at 11.25 o'clock a. m. in Book "A" of Deeds, page 121. Hyrum Standing, county recorder.

(Here follows diagram marked p. 78.)

79 TERRITORY OF UTAH, } *ss:*
County of Box Elder, }

In the Probate Court in and for said County.

In the Matter of the Estate of GEO. J. WARD, Deceased.

Decree of Distribution of Estate.

Alfred Ward and T. W. Brewerton, administrators of the estate of Geo. W. Ward, deceased, having on the 24th day of May, A. D. 1884, filed in the court their petition setting forth among other matters, that all their account- have been finally settled and praying for an order of distribution of the residue of said estate among the persons entitled; and afterwards on the 24th day of May, 1884, by posting a copy in three public places in the county, there being no newspaper published in the county, of the order to show cause why distribution should not be made for ten days before the 9th day of June, 1884, as directed by this court, and as required by law, the hearing of said petition, and it duly appearing to the satisfaction of this court that such publication was completed at least 10 days before the day set for hearing said matter, and that the residue of said estate hereinafter described is now ready for distribution. That the whole of said property is common property.

That the said George W. Ward, died intestate in the city of Willard, county of Box Elder, on the 18th day of August, 1882, leaving him surviving 12 heirs, viz: the heirs of William Ward, deceased, Geo. Ward, Richard T. Ward, Alfred Ward, Moroni Ward, John J. Ward, Charles R. Ward, Mary Ann Ward Walker, Joseph W. Ward, and Hyrum H. Ward (the last minors) his only descendants; that the estimated expense of closing said estate will amount to the sum of thirty dollars; that the said twelve surviving heirs of said deceased are entitled each to $\frac{1}{2}$ of the residue of said estate.

Now on the said ninth day of June, A. D. 1884, on the petition of said administrators, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise.

It is hereby ordered and adjudged and decreed, that all the acts and proceedings of said administrators as appearing upon the records thereof be and the same are hereby approved, and confirmed, and that after deducting said estimated expenses of closing the administration, the residue of said estate of Geo. W. Ward, deceased, hereinafter particularly described and now remaining in the hands of said administrators and any other property not now known or described which may belong to the said estate, or in which

the said estate may have any interest be and the same is hereby distributed as follows, to wit: Geo. Ward ½ interest in piece No. 1 of South farm Richard T. Ward, ½ interest in No. 1 piece of South farm. Alfred Ward ½ interest in No. 2 piece of South farm.
80 Moroni Ward ½ interest in No. 2 piece of South farm.
Approved:

P. F. MADSEN,
Probate Judge.

Filed June 9th, 1884.

A. H. SNOW, *Clerk.*
P. F. MADSEN, *Deputy.*

81 DEFENDANTS' EXHIBIT 2.

Quitclaim Deed.

Moroni Ward and Eliza V. Ward, his wife, grantors, of Washakie, Box Elder county, Utah, hereby quitclaim to Alfred Ward, grantee of Willard city, Box Elder county, for the sum of two hundred and fifty dollars, the following-described tract of land in Box Elder county, State of Utah, to wit: An undivided one-half interest in No. 2 piece of the South farm of Geo. W. Ward, deceased, as designated by the appraisers of said estate, containing eight and seventy-eight-hundredths (8.78/100) acres more or less, less the amount now owned by the U. P. R. R. Co. for right of way, being 21 rods wide and extending from the C. P. R. R. on the west to the east side of the old C. P. R'y grade on the east, being a part of the S. E. ¼ of sec. 27 and a part of the S. W. ¼ of sec. 26, T. 8 N. R. 2 W., Salt Lake meridian, together with the water rights belonging.

Witness the hand of the said grantors this ninth day of April, A. D. one thousand eight hundred and ninety-six.

MORONI WARD.
ELIZA V. WARD.

Signed in the presence of—
HYRUM STANDING.

STATE OF UTAH,
County of Box Elder, } *ss:*

On the 9th day of April, A. D. 1896, personally appeared before me Moroni Ward and Eliza V. Ward, his wife, the signers of the above instrument, who duly acknowledged to me that they executed the same.

[SEAL.]

HYRUM STANDING,
Recorder, Box Elder County.

Endorsed: Quitclaim deed. From Moroni Ward and Eliza V. Ward, his wife, to Alfred Ward.

82 DEFENDANTS' EXHIBIT 3.

Quitclaim Deed.

John D. Jones, grantor of Malad City, Oneida county, Idaho Territory, hereby quitclaims to George Cook and Samuel N. Cook (on the 4th day of April, A. D. 1882) grantees of Willard city, Box Elder county, Utah, for the sum of one hundred and fifty dollars, the following-described tract of land in Box Elder county, Utah Territory: Beginning at the northeast corner of the S. E. ¼ of the S. E. ¼ of section twenty-seven (27) township eight (8) north range two (2) west, Salt Lake meridian, running thence south four rods, and thirteen feet; thence west eighty rods (80); thence north four (4) rods and thirteen feet; thence east eighty (80) rods to place of beginning, and containing in all 2 64/100 acres more or less. This transfer was made on the 4th day of April A. D. 1882.

Witness the hand of the said grantor this 8th day of April, A. D. 1892.

JOHN D. JONES.

Signed in the presence of—
EDWARD MORGAN.

TERRITORY OF UTAH, } ss:
County of Box Elder, }

On the 8th day of April, A. D. 1892 personally appeared before me the undersigned mayor of Willard city, John D. Jones, the signer of the above instrument, who duly acknowledged to me that he executed the same.

PETER LOWE,
Mayor of Willard City.

Endorsed: Quitclaim deed. From John D. Jones to George Cook and Samuel N. Cook.

83 DEFENDANTS' EXHIBIT 4.

Quitclaim Deed.

Lyman B. Wells and Bithiah Wells, grantors of Willard city, Box Elder county, Utah Territory, hereby quitclaim to George J. Wells and Carson F. Wells, on the 5th day of April 1876, the transfer being made, grantees of Willard city, Box Elder county, Utah, for the sum of fifteen hundred dollars, the following-described tract of land, in Box Elder county, Utah Territory, beginning at a point twenty-six (26) rods 15½ feet south of the northeast corner of the south half of the southwest quarter of section twenty-six (26) township eight (8) north range 2 west, Salt Lake meridian; running thence west three hundred and twenty rods (320) *rods*, more or less to Great Salt lake; thence south fourteen (14) rods; thence east 320

rods; thence north 14 rods to place of beginning, being situated in the S. W. quarter of section twenty-six (26) and the S. E. quarter of section twenty-seven (27) and containing twenty-eight (28) acres more or less.

Witness the hand of the said grantors this 23rd day of November, A. D. 1891.

LYMAN B. WELLS.
BITHIAH WELLS.

Signed in presence of—
N. O. WELLS.
S. N. COOK.

TERRITORY OF UTAH, } ss:
County of Box Elder, }

On the 23rd day of November, 1891, personally appeared before me the undersigned, a justice of the peace for Box Elder county, Lyman B. Wells and Bithiah Wells, his wife, the signers of the above instrument, who duly acknowledged to me that they executed the same.

S. N. COOK,
Justice of the Peace.

84 DEFENDANTS' EXHIBIT 5.

Know all men by these presents, that we, Richard T. Ward, and Lizzie Ward, of Pottawattamie county, Iowa, in consideration of the sum of one hundred and fifty dollars in hand paid by George Ward of Box Elder county, Utah Territory, do hereby quitclaim unto the said George Ward, the following-described premises situated in Box Elder county, Territory of Utah, to wit: The undivided one-half of twenty rods wide bounded on the east by the C. P. railway and extending west to the Great Salt lake. Said land bounded on the south by Wells land claim, and on the north by the old John D. Jones claim, now occupied by Geo. Cook and son, and being a portion of the S. E. ¼ of the S. E. ¼ and also a portion of lot four (4) in section (27) twenty-seven, township eight (8) north of range (2) two, west, Salt Lake meridian, U. S. survey and containing seven acres more or less.

Witness our hands on this 30th day of April, 1885.

R. T. WARD.
LIZZIE WARD.

STATE OF IOWA, } ss:
Pottawattamie County, }

On this the 30th day of April, 1885, before me Henry Gittins, a justice of the peace, within and for the said county and State, personally came Richard T. Ward and Lizzie Ward, husband and wife, to me personally known to be the identical persons whose names are affixed to the above instrument as quitclaim grantors, and acknowledged the

execution of the same to be their voluntary act and deed for the purposes therein expressed.

Witness my hand officially on said date last above written.

HENRY GITTINS,
Justice of the Peace.

STATE OF IOWA, }
Pottawattamie County, } ss:

I, J. J. Shea, clerk of the district court in and for said county do hereby certify that Henry Gittins, before whom the annexed instrument was proven, was at the date thereof and now is an acting justice of the peace duly qualified to act as such; that under the laws of Iowa he is authorized to take acknowledgments and proof of deeds, administer oaths, etc.; that the annexed instrument is duly executed and acknowledged according to the laws of said State; that I am well acquainted with the signature of the said Henry Gittins, and believe *that* the one subscribed to the annexed instrument and purporting to be his, to be genuine.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said district court at my office in Council Bluffs this 2nd day of May, A. D. 1885.

J. J. SHEA,
[SEAL.] *Clerk of the District Court.*

85 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff, *v.* GEORGE COOK ET AL., Defendants. } Notice of Intention to Move for New Trial.

Please take notice that the plaintiff intends to move the court to set aside and vacate the verdicts and decisions heretofore rendered herein, and to grant a new trial in this cause, upon the following grounds, viz:

1. Insufficiency of the evidence to justify the verdicts and decisions in favor of the defendants and against the plaintiff.
2. That said verdicts and decisions are against law.
3. On account of errors in law occurring at the trial and excepted to by the plaintiff.

This motion will be made upon the minutes of the court.

CHASE AND CHASE AND
T. D. JOHNSON,
Attorneys for Plaintiff.

To the above-named defendants, and their attorneys B. H. Jones and R. H. Jones.

Indorsed: Service of copy is hereby acknowledged this 21st day of May, 1901. Ricy H. Jones, B. H. Jones, attorneys for defendants.

Indorsed: Filed May 21st, 1901. Joseph Jensen, clerk, by C. C. Jensen, deputy.

86 In the District Court of the First Judicial District, Box Elder County, State of Utah, May Term.

Present: The Hon. Charles H. Hart, judge.

JULY 10, 1901.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants. } Order.

The motion of plaintiff for a new trial in the above-entitled action coming on regularly for hearing, and the same having been submitted to the court for decision, and now being fully advised in the premises, it is ordered, that the said motion for new trial be, and the same is denied.

CHARLES H. HART, *Judge.*

Entered in the minutes of the court.

87 In the District Court of the First Judicial District, Box Elder County, State of Utah, May Term.

Present: The Hon. Charles H. Hart, judge.

JULY 10, 1901.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants. } Order.

Good cause appearing therefore, it is hereby ordered and the plaintiff is hereby granted 15 days' additional time in which to prepare and serve its proposed bill of exceptions on the defendants, in the above-entitled cause.

CHAS. H. HART, *Judge.*

Entered in the minutes of the court.

88 Service of the foregoing original proposed bill of exceptions prepared and served by the plaintiff herein, is hereby acknowledged this the 24th day of August, 1901.

RICY H. JONES,
B. H. JONES,
Attorneys for the Defendants.

I hereby certify that the within and foregoing bill of exceptions is full, true and correct, and the cause is hereby settled and allowed as the bill of exceptions in said cause, and the same has been prepared, served, settled and allowed within the time allowed by law, and as extended by order of the court herein.

CHAS. H. HART, *Judge.*

Dated this 9th day of October, 1901.

89 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE WARD, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley, Defendants.

Notice of Appeal.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of Utah, from the judgments therein entered in the said district court on the 23rd day of May, 1901 in favor of the said defendants and against the said plaintiff, and in which said cause plaintiff's motion for a new trial was denied on the 10th day of July, 1901, when said judgments became final, and from the whole thereof.

CHASE AND CHASE,
T. D. JOHNSON,
Attorneys for Plaintiff.

Dated Jan'y 8th, 1902.

To the said defendants and to B. H. Jones and R. H. Jones, their attorneys.

90 In the District Court of the First Judicial District, Box Elder County, State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff,
vs.
GEORGE COOK ET AL., Defendants.
Certificate.

I, Joseph Jensen, clerk of the district court of the State of Utah, in and for Box Elder county, do hereby certify that the above and foregoing is the judgment-roll in the above-entitled action, filed on the 23rd day of May, 1901; that the notice of intention to move for a new trial was made and entered upon the minutes of said court on the 10th day of July, 1901; that the notice of appeal of the plaintiff was filed on the eighth day of January, 1902, and that all of the foregoing are transmitted to the Supreme Court pursuant to said appeal, and I further certify that an undertaking on the part of the plaintiff in due form was filed on the eighth day of January, 1902.

[SEAL.] JOSEPH JENSEN, *Clerk.*

91 In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
v.
GEORGE COOK ET AL., Respondents.
} Petition in Error.

Your petitioner, The Toltec Ranch Company, a corporation, the plaintiff and appellant in the above-entitled cause, herewith files, in accordance with the statute in such case made and provided, this its petition in error, and attaches the same to the transcript on appeal, and respectfully petitions this honorable court to reverse the judgments and decision of the court below, and to that end your petitioner, the appellant, sets forth the following errors, and relies upon each and every of them, for a reversal of said cause:

1. The trial court erred in permitting the calling and empanneling of a jury, and the hearing and trial of this cause by a jury, over the objection of the plaintiff that said cause was an action in equity, and as such triable to the court.

(Trans. p. 59.)

2. The trial court erred in overruling the objection of the plaintiff to the question asked of the witness J. J. Ward, "Have Joseph Dudley and Charles Dudley been occupying any of this land?" and erred over the objection of plaintiff in permitting any testimony to be given proving or tending to prove any adverse claim or possession of or in the said defendants or either of them.

(Trans. p. 62.)

3. The trial court erred in overruling plaintiff's motion made when the defendants had rested their case, for judgment against the said defendants and each of them, on the grounds set forth in said motion; and the court erred in submitting to the jury any issues raised in the answers of said defendants; viz., whether they and each of them had acquired title by adverse possession.

(Trans. p. 76.)

92 4. The trial court erred in giving to the jury instructions number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, and each and every of said instructions, in that in so doing, it held that the defense of adverse possession could be made out in favor of the defendants and each of them, notwithstanding the evidence showed a patent by the United States had been issued no longer ago, that January, 1900, to the Central Pacific Railroad Company, the grantor of plaintiff's predecessors to and for said lands described in the complaint; and notwithstanding it nowhere appeared in the evidence when the lands in dispute had been surveyed by the United States Government.

(Trans. pp. 77–80, 81–83.)

5. The trial court erred in refusing to submit to the jury for answer by them, the special interrogatories requested by the plaintiff.

(Trans. p. 81.)

6. The trial court erred in entering judgment in favor of the defendants, and against the plaintiff, in that under the evidence in said cause, seven years had not expired since the date of the issuance of the patent by the United States to the Central Pacific Railroad Company, before the commencement of this action, and in that, the statute of limitations would not begin to run prior to the issuance of said patent.

(Trans. p. 60.)

7. The trial court erred in entering judgment in favor of the defendants and the plaintiff, in that it nowhere appears in the evidence when the land in controversy was surveyed by the United Ststes Government, and the statute of limitations would not begin to run against the plaintiff or its predecessors, in favor of the defendants or their predecessors until the same had been surveyed.

8. The trial court erred in submitting said cause to the jury, and erred in not peremptorily instructing them to return a verdict in favor of the plaintiff and against the defendants and each of them.

93 Upon the hearing of said cause in the supreme court of the State of Utah, the said appellant will rely upon each and every of the foregoing assignments of error for a reversal of said cause.

CHASE & CHASE,
T. D. JOHNSON,
Attorneys for Appellant.

94 In the Supreme Court of the State of Utah, Regular February Term.

FEBRUARY 20, 1902.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
vs.
GEO. N. COOK ET AL., Respondents.
} Submission.

This cause coming on regularly to be heard was submitted upon briefs by counsel for the respective parties herein, and by the court taken under advisement.

Judgment.

Title of Court and Cause.

MARCH 18, 1902.

This cause having been heretofore submitted upon briefs by counsel for the respective parties, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby affirmed, with costs.

95 In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
vs.
GEORGE COOK ET AL., Respondents.

MINER, *C. J.:*

This action was brought to quiet title against several defendants having several interests in different pieces of land. The plaintiff prays for an injunction. The court treated the cases as having both legal and equitable issues.

Under objection the court proceeded with the trial of the case with a jury stating that if it appeared later in the trial that the case was simply an equitable proceeding, the jury might be considered as merely advisory. The jury found a verdict for each defendant as to each parcel of land, and, under instructions, brought in a special verdict in which separate special findings were made as to each defendant, all of which were in harmony with the general verdict and judgment. The court adopted the verdict and special findings of the jury, and rendered judgment thereon in favor of the several defendants.

We do not discover such irregularity in these proceedings as to warrant a reversal of the case.

96 In the case of Smith *v.* Richardson, 2 Utah 424, it was held by the territorial court that "The power to disregard or modify the findings of a jury in a chancery case is inherent in the court, the object of the verdict being not to decide the case, but to instruct or advise the conscience of the chancellor. And this rule is not of modern origin but is hoary with age and plainly laid down and recognized all through the books. 2 Dan. Pl. & Pr. sec. 1147; Adams Eq., side p. p. 376–377; 3 Greenl. Ev. sec. 261 *et seq.*; Siebert *v.* McAvoy, 15 Ill. 108; Ward *v.* Hill, 4 Gray, 593; Garsed *v.* Beall, 2 Otto, 684."

Also Stele *v.* Boley, 7 Utah 67; Park *v.* Wilkinson, 21 Utah 279; Stockmen *v.* Riverside, 64 Cal. 57; Comp. Laws, Utah, 1888, secs. 3128, 3511.

With reference to the rule allowing a cause of action to be tried against several defendants having separate interests, Mr. Pomeroy, says: "Fourth. Where the same party, A., has or claims to have some common right against a number of persons the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as codefendants."

Pom. Eq. Jur. sec. 245.

The next question for consideration is whether the statute of limitations can prevail as a bar to the action when it appears that the patent of the U. S. Government was not issued to the plaintiff until January 20, 1900.

It is conceded by both parties, and we are of the opinion that the decision of this court in Toltec Ranch Co. *v.* Babcock, 66 Pac.
97 876, — Utah —, is decisive of this question.

The judgment of the district court is affirmed, with costs. It is so ordered.

We concur:
BASKIN, *J.*
BARTCH, *J.*

98 Filed Apr. 12, 1902. —— ——, Clerk Supreme Court, Utah.

In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff and Appellant,
vs.
GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley, Defendants and Respondents.
} Application for Writ of Error.

Comes now the plaintiff and appellant, Toltec Ranch Company, a corporation, and says that in the final judgment rendered by the supreme court of the State of Utah, herein, on the — day of March, 1902, and in the proceedings had prior thereto certain errors were committed to the prejudice of said plaintiff, which will more in detail appear from the assignment of errors to be filed as a part of this petition, and further says that in the final judgment of the first judicial district court of Box Elder county, State of Utah, in this cause a decision was had against the validity of certain statutes of the Congress of the United States, and against the title of the plaintiff to certain lands situated in the State of Utah to which it claimed title under certain statutes of the United States—that is to say, the Pacific Railroad grants—and to which it claimed title under and by virtue of a patent to said lands having on the 20th day of January, 1900, been issued to its predecessor in interest by the Government of the United States—which said statutes and said patent were drawn in question by said litigation, the plaintiff claiming that the lands mentioned and described in said action were lands which were in the grant to the Central Pacific Railroad Company of California, and that under the terms of said grants and of the said patent the plaintiff was entitled to recover the possession thereof from the defendants in said action, and the defendants claiming and contending, that notwithstanding the said patent had issued within the period of seven years before the commencement of the said action,
that under the terms of the said grants of Congress to the
99 said railroad company, the said defendants could and had acquired title to said lands by adverse possession under the statutes of limitations of the State of Utah, against the said plaintiff and its predecessors in interest and grantors.

That the decision of the first judicial district court, wherein the said cause was tried, was against the validity and authority of the claim of plaintiff, and the decision of the supreme court was against the authority and validity of the claim of the plaintiff.

Wherefore, this plaintiff prays that a writ of error may issue in its behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that the transcript, papers, and records in this cause, together with the opinion of this honorable court herein, all duly authenticated, may be sent to the Supreme Court of the United States.

Dated April 2nd, 1902.

T. D. JOHNSON,
Attorney for Plaintiff, Toltec Ranch Company, a Corporation.

100 Filed Apr. 12, 1902. —— ——, Clerk Supreme Court, Utah.

In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff and Appellant, *vs.* GEORGE COOK, S. N. COOK, ALFRED WARD, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley, Defendants and Respondents.	Allowance of Writ of Error.

On this the 12th day of April, 1902, came the said Toltec Ranch Company, a corporation, plaintiff, by its attorney of record herein, T. D. Johnson, and filed and presented herein a petition praying for the allowance of a writ of error intended to be urged by it; praying also that a duly authenticated transcript of the record, proceedings, papers, and opinion upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such full and fair proceedings may be had as may be proper in the premises:

In consideration thereof I, James A. Miner, chief justice of the supreme court of the State of Utah, do hereby allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred dollars.

JAMES A. MINER,
Chief Justice.

101 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a suit which — in the supreme court of the State of Utah, before you, being the highest court of law or equity of said

State in which a decision could be had in said State between The Toltec Ranch Company, a corporation, plaintiff, and George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley and Charles Dudley, defendant, wherein was drawn in question construction of statutes of the Congress of the United States, and your decision was against the title specially set up and claimed to the real property in dispute in said action which the plaintiff claimed title to by virtue of land grants and of a patent from the United States to the plaintiff's predecessor in interest, which said land grants are evidenced by acts of Congress of the United States, and which said patent was executed by the President of the United States by virtue of the acts of Congress of the United States, and your decision was against the validity of said title specially set up and claimed under such statutes and patent and manifest error hath happened, to the great damage of the said Toltec Ranch Company, as by its complaint appears, we, being willing that error, if any hath happened should be duly corrected and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days of the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 12 day of April, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah.

Allowed by James A. Miner, chief justice of the supreme court of the State of Utah.

JAMES A. MINER,
Chief Justice.

Filed Apr. 12, 1902.

_____,
Clerk Supreme Court, Utah.

102 In the Supreme Court of the United States.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff in Error,
vs.
GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley, Defendants in Error. } Citation.

To George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley, defendants in error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, within 60 days of the date of this citation, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, Utah, wherein The Toltec Ranch Company is plaintiff in error and you, the said George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley and Charles Dudley are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 12th day of April, A. D. 1902.

JAMES A. MINER,
Chief Justice of the Supreme Court of the State of Utah.

I hereby acknowledge due and legal service of the foregoing citation, this the 14 day of April, A. D. 1902.

RICY H. JONES &
B. H. JONES,
Attorneys of Record for the Defendants in Error, George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley.

103 Filed Apr. 12, 1902. —— ——, Clerk Supreme Court, Utah.

In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Plaintiff and Appellant,
vs.
GEORGE COOK, S. N. COOK, ALFRED WARD, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley, Defendants and Respondents. } Assignments of Error.

Comes now the plaintiff, Toltec Ranch Company, a corporation, and makes its assignments of error, as follows:

1. The court erred in affirming the judgment of the trial court.

2. The court erred in holding that such title in the land in dispute passed to the Central Pacific Railroad Company of California from the United States of America under the acts of July 1, 1862, and July 2, 1864, said acts being found and printed in volume 12 of the United States Statutes, pages 289 and following, and volume 13 of the United States Statutes, on page 356 and following respectively; that the said defendants could and had acquired title thereto against the plaintiff and its predecessors in interest by adverse possession under the statute of limitations of the Territory and State of Utah, said statute of limitations being found and printed in volume 2 of the Compiled Laws of 1888 of the Territory of Utah at page 220 and following, and found and printed in the Revised Statutes of the State of Utah at page 634 and following respectively.

3. The court erred in holding and deciding that the said defendants could and had acquired title to the said lands in dispute by adverse possessiou under the said statute of limitations by an adverse holding of said lands prior to the 20th day of January, 1900, the date of the patent to the Central Pacific Railroad Company from the United States.

4. The court erred in holding and deciding that the said defendant could and had acquired title to the said lands by adverse possession under the said statutes of limitations without proof
104 of the date of the survey of the lands in dispute by the United States.

Dated April 2, 1902.

T. D. JOHNSON,
Attorney for the Plaintiff, Toltec Ranch Company, a Corporation.

105 In the Supreme Court of the State of Utah.

TOLTEC RANCH COMPANY, a Corporation, Appellant,
vs.
GEORGE COOK, P. N. COOK, ALFRED WARD, GEORGE WARD, G. J. WELLS, C. G. WELLS, Joseph Dudley, and Charles Dudley, Defendants and Respondents.

Bond.

Know all men by these presents, that we, The Toltec Ranch Company, a corporation, as principal, and James McTerney and William Keyting, as sureties, are held and firmly — unto George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley and Charles Dudley, defendants and respondents, in the full and just sum of five hundred dollars, to be paid to said respondents, their heirs and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally by these presents.

Sealed with our seals, and dated this the 7th day of April, 1902.

Whereas, lately, in the supreme court of the State of Utah, in the suit depending in said court between said plaintiff The Toltec Ranch Company, a corporation, and the said defendants, George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley and Charles Dudley, a judgment was rendered against the said plaintiff, Toltec Ranch Company, and it, the said Toltec Ranch Company, plaintiff, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley and Charles Dudley, citing and directing them to be and appear at a term of the Supreme Court of the United States, holden at *a term of the Supreme Court of the United States, holden at* the seat of government at Washington, within 60 days of the date of said citation.

Now, the condition of the above obligation is such, that if the said Toltec Ranch Company shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make the plea
106 good, then the obligation to be void, else to remain in full force and virtue.

TOLTEC RANCH CO.,
By D. P. TARPEY, *Manager.*
JAMES McTERNEY. [SEAL.]
WM. KEYTING. [SEAL.]

Signed, sealed and delivered in the presence of—
JOSIAH THOMAS.

STATE OF UTAH,
County of Salt Lake, } ss:

James McTerney and William Keyting, each being severally duly sworn, each for himself on oath says: That he is a resident and householder in said county and State; that he is worth the sum mentioned in the foregoing bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

JAMES McTERNEY.
WM. KEYTING.

Subscribed and sworn to before me this 7th day of April, 1902.
[SEAL.] JOSIAH THOMAS,
Notary Public.

Approved by James A. Miner, chief justice of the supreme court of the State of Utah.

JAMES A. MINER,
Chief Justice.

107 UNITED STATES OF AMERICA:

STATE OF UTAH,
County of Salt Lake, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, pursuant to a writ of error allowed in the case wherein The Toltec Ranch Company, a corporation, is plaintiff in error, and George Cook *et al.*, are defendants in error, do herewith return attached hereto a transcript of the proceedings had in said cause, with a copy of the judgment and opinion of said court, and the bond given in pursuance of the allowance of said writ of error, together with the original order granting said writ of error, the writ of error, citation, and assignments of error.

And I further certify that said transcript of the record and proceedings had in said cause, contains a full, true and correct copy of the several originals now on file and of record in my office.

Seal State of Utah Supreme Court, Jan. 4, 1896.

In witness whereof, I hereunto set my hand and affix the seal of said supreme court of the State of Utah, this the 31st day of March, A. D. 1902.

LILBURN P. PALMER, *Clerk.*

Endorsed on cover: File No. 18,515. Utah supreme court. Term No. 316. Toltec Ranch Company, plaintiff in error, *vs.* George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley, & Charles Dudley. Filed April 25", 1902.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1902.

No. 316.

TOLTEC RANCH COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE WARD, G. J. WELLS, C. F. WELLS, JOSEPH DUDLEY and CHARLES DUDLEY, DEFENDANTS.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal by the plaintiff in error from the decision of the Supreme Court of the State of Utah affirming the judgment of the District Court of Box Elder County of said State, and from the judgment of said District Court.

The suit was commenced on February 1, 1901, in said District Court, and is an action in the usual form under the statute of said State brought by the plaintiff (transcript, p. 1) against the defendants to quiet the title of plaintiff to certain lands situate in said County of Box Elder and State of Utah, described as follows:

The S. E. ¼ of the S. E. ¼ of Sec. 27, Township Eight (8) North, Range Two (2) West, Salt Lake Meridian, U. S. Survey.

After the overruling by the trial Court of the demurrers filed by them, the defendants answered the complaint, denying the material allegations thereof (trans. 2-14) and affirmatively pleading the statutes of limitations of said State, each of said defendants claiming to own a certain distinct portion of the land described in the complaint.

Upon the trial of said cause in said District Court, the plaintiff rested its case upon the following stipulation, made in open Court:

"IT IS STIPULATED that the plaintiff in this case is the grantee through mesne conveyances from the Central Pacific Railroad Company of the lands set out and described in plaintiff's complaint, and that a patent of the United States Government was duly issued and delivered to the said Central Pacific Railroad Company (trans. 29) bearing date January 20, 1900, conveying the said lands described in the complaint with other lands; that the Central Pacific Railroad Company, grantors, by deed dated October 17, 1895, conveyed said lands to D. P. Tarpey, and that D. P. Tarpey and wife, grantors, conveyed said land by deed to M. F. Tarpey, bearing date December 8, 1895; and that M. F. Tarpey and wife, grantors, conveyed the said land to the plaintiff in this action by deed dated October 17, 1896.—Copies of said patent and deeds are attached hereto and marked 'Plaintiff's Exhibits 'A,' 'B,' 'C' and 'D,' respectively."

On behalf of the defendants it was stipulated as follows:

"IT IS HEREBY STIPULATED that the map of definite location of the Central Pacific Railroad Company was filed in the office of the Secretary of the Interior on the 20th day of October, 1868; that the land described in the complaint is within the ten-mile limit of the grant to the Central Pacific Railroad Company."

The defendants were permitted by the trial Court, over the objection of the plaintiff, to introduce testimony tending to show that the several defendants had used, held, occupied and claimed the several pieces of land described in their answers, of which they claimed the title and ownership (trans. 29-38) under and by virtue of the statute of limitations, as provided in Volume 2 of the Compiled Laws of 1888, at page 220, et seq., of the Territory of Utah, and of the Revised Statutes of the State of Utah, 1898, page 634, et seq.

Said cause was submitted by the trial Court to the jury, which returned verdicts in favor of each of said defendants, upon which judgments were entered, and upon appeal to the Supreme Court of said State, the judgment of the lower Court was affirmed (trans. 60-61).

The contention of the plaintiff in error is that the judgment of the trial Court and the decision of the appellate Court is against law, and upon suing out of the writ of error to this Court the plaintiff in error made its assignment of errors as follows:

(1). The Court erred in affirming the judgment of the trial Court.

(2.) The Court erred in holding that such title passed to the Central Pacific Railroad Company of California from the United States of America under the Acts of July 1, 1862, and July 2, 1864, said Acts being found and printed in Volume 12 of the United States Statutes, pages 289 and following, and Volume 13 of the United States Statutes, on page 356 and following, respectively; that the said defendants could and had acquired title thereto against the plaintiff and its predecessors in interest by adverse possession (trans. 64-65) under the statute of limitations of the Territory and State of Utah, said statute of limitations being found and printed in Volume 2 of the Compiled Laws of 1888 of the Territory of Utah, at page 220 and following, and found and printed in the Revised Statutes of the State of Utah, at page 634 and following, respectively.

(3). The Court erred in holding and deciding that the said defendants could and had acquired title to the said lands in dispute by adverse possession under the said statute of limitations, by an adverse holding of said lands prior to the 20th day of January, 1900, the date of the patent to the Central Pacific Railroad Company from the United States.

(4). The Court erred in holding and deciding that the said defendants could and had acquired title to said lands by adverse possession under the said statute of limitations, without proof of the date of the survey of the lands in dispute by the United States.

ARGUMENT.

The Supreme Court of the State of Utah, in reaching its conclusion that the bar of the statute of limitations of the State of Utah constituted a defense to the action of plaintiff, rely upon the following cases of this Court:

Deseret Salt Company vs. Tarpey, 142 U. S. 241.

Tarpey vs. Madsen, 178 U. S. 215.

(trans. 78-79).

And under the authority of these cases held that the statute of limitations ran in favor of the defendants, as well before as after the issuance of the patent to the railroad company.

And as shown by the record, unless this were true the defendants must fail.

Under the provisions of the statutes of the Territory and State of Utah, there must be an adverse holding of lands for at least a period of seven years by the defendants, before its provisions can be invoked.

Compiled Laws of Utah, 1888, Vol. 2, Page 220.

Revised Statutes of Utah, 1898, Page 634.

This action was commenced in the year 1901, the patent of the Government was issued to the railroad company January 20, 1900.

It is undoubtedly the law that the statute of limitations has no application and cannot be invoked in favor of a party claiming title thereunder, so long as the legal title remains in the Government.

Gibson vs. Chouteau, 13 Wall. 92.

Redfield vs. Parks, 132 U. S. 239.

The contention of the plaintiff in error is that it does not follow, as held by the Supreme Court of the State of Utah, because the railroad company may have acquired the legal title by virtue of the grant of congress, that the statute of limitations runs, or that title may be acquired by adverse possession prior to the issuance of patent, and this contention is made, notwithstanding the decision of this Court in the case of Langdeau vs. Hanes, 21 Wall. 521, because of the exception stated in the opinion in this case.

Certain conditions in the grants of Congress to the Pacific Railroads have since been recognized, and certain exceptions contained in said grants have been given effect by the decisions of this Court, which may be said to limit the broad scope which might be

inferred from the language used in the case of Salt Company vs. Tarpey.

Ankeny vs. Clark, 148 U. S. 345.

Barden vs. Northern Pacific R. R. Co., 154 U. S. 288.

Nelson vs. N. P. R'y Co.

(decided by this Court January 26, 1903).

Reverting to the case of Langdeau vs. Hanes (supra), Mr. Justice Field said: "If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated."

In the case of Ankeny vs. Clark this Court, quoting from Salt Company vs. Tarpey, says:

"In the case of Deseret Salt Company vs. Tarpey the Court, per Mr. Justice Field, regarding the failure or omission to pay the survey charges as operative to 'preserve to the Government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold its patents from the parties entitled to them until such payment' and thus to give the Government a lien for said costs."

And adds: "We therefore conclude that Ankeny, the defendant below, if he held only a title derived from the Northern Pacific Railroad Company, and if that company had not paid the costs of surveying and had not received a patent, did not hold such a title as it was obligatory on the plaintiff to accept."

In the case of Barden vs. N. P. R. R. Co., (supra), this Court held, in substance, that even after the performance of all the conditions subsequent by the railroad company, as contemplated by the grant, the discovery of mineral *before patent had actually issued, would defeat the railroad company's title.* It therefore follows that until patent actually issues, the railroad companies or their grantees have not such a title as should set the statute of limitations in motion.

In the case at bar, the only evidence in the record showing that the land in dispute was not within any of the exceptions contained in the grant, and a compliance with the conditions precedent to the issuance of the patent, is the patent itself.

As stated in the case of Langdeau vs. Hanes (supra), "a segregation by survey will be required."

Except as recited in the patent, there is no evidence showing when the land was surveyed and ascertained to be an odd-numbered section, as contemplated by the grant, nor when the Government lien was discharged by the selection of same by the railroad company, and the payment of the fees for surveying, selecting and conveying same, nor, except as appears in the patent, no proof to show the railroad had ever been built at all.

In addition to the recitals in the patent, it is stipulated in the record that the map of definite location of the Central Pacific Railroad Company was filed in the office of the Secretary of the Interior, on the 20th day of October, 1868, and that the land described in the complaint is within the ten-mile limit of the grant to the Central Pacific Railroad Company.

The record fails to show when this land was surveyed, when selected by the railroad company, or when the fees were paid. That all these things were done is proved, of course, by the issuance of the patent, but there can be no presumption as to the time, unless it might be said to be upon the date of the patent itself.

If it is true that no presumption will be indulged as to the time of the selection of the lands by the railroad company, or of the date of its survey by the Government, or the time of the payment of the fees required by law, and if these things, or either of them, are required to be done before the statute of limitations would begin to run, it follows that the defendants have not acquired any title by their alleged adverse holding, and the judgment should be reversed.

Respectfully submitted,

T. D. JOHNSON,
Attorney for Plaintiff in Error.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
Of Counsel.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 42.

TOLTEC RANCH COMPANY,
Plaintiff in Error,

vs.

GEORGE COOK AND OTHERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Additional Brief in Behalf of Plaintiff in Error.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
T. D. JOHNSON,
Of Counsel for Plaintiff in Error.

C. H. Reynolds, Printer and Binder, Syracuse, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 48.

TOLTEC RANCH COMPANY,
Plaintiff in Error,

vs.

GEORGE COOK, AND OTHERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

ADDITIONAL BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

Statement.

The land in controversy is within the place limits of the grant to the Central Pacific Railroad Company under the Act of Congress approved July 1, 1862 (Appendix, p. 1), and entitled "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the Same for Postal, Military, and Other

Purposes" (12 U. S. Stat., 489) as amended by the Act of Congress approved July 2, 1864 (Appendix, p. xx) (13 U. S. Stat., 356), and the plaintiff in error is the grantee of the land in question through mesne conveyances from the Central Pacific Railroad Company (Record, p. 29). The Central Pacific Railroad Company filed its map of definite location in the office of the Secretary of the Interior on the 20th day of October, 1868 (Record, p. 29). It does not appear from the record that the land in dispute was ever surveyed or that the Railroad Company ever paid to the United States "the cost of surveying, selecting and conveying" the land in dispute, as required by the 21st section of the Act of 1864. A patent for this land, dated January 20, 1900, was duly issued by the United States and delivered to the Central Pacific Railroad Company (Record, p. 29).

In January, 1901, the plaintiff brought this action against the defendants to quiet its title to the land in dispute (Record, p. 1). The defendants in answer to the complaint alleged that they and their grantors and predecessors had claimed, possessed and owned the land described in the plaintiff's complaint for more than thirty years peaceably, continuously and adversely to

the plaintiff, and that they were now the owners and seized thereof, and that the plaintiff's cause of action was barred by the statute of limitations as provided by sections 2856–2872, inclusive, of the Revised Statutes of Utah (Record, p. 4).

The case was tried before a jury and the defendants were permitted, over the objection of the plaintiff, to introduce evidence tending to show that they were entitled to the land in question by reason of adverse possession (Record, p. 30). A verdict was returned in favor of the defendants upon which judgment was entered and an appeal taken to the Supreme Court of the State which affirmed the judgment below.

The case has been brought here by writ of error under the provisions of section 709 of the Revised Statutes of the United States, and the single question presented is whether a railroad can be deprived of land granted to it by the United States by reason of the adverse possession by a third party prior to the issuance of a patent for the land by the United States.

TOLTEC RANCH COMPANY AGAINST WILLIAM BABCOCK ET AL. NO. 49.

The facts in the Babcock case are substantially the same as in the preceding case upon the

docket against George Cook and others. The Babcock case is a consolidated action being an action of ejectment and an action in claim and delivery for certain crops, which were tried together. The question involved is identical with the question in No. 48, the preceding case, brought against George Cook and others, viz., whether the statute of limitations of a State begins to run against a grantee of the United States prior to the issuing of a patent for the land. The two cases will be argued together, and it seems unnecessary to make any further statement of the facts in the Babcock case.

Assignment of Errors.

The Supreme Court of the State of Utah erred:

I. In not reversing the judgment of the District Court of the First Judicial District, Box Elder County, State of Utah, entered herein on May 24, 1901, and directing the said Court to render a judgment in favor of the plaintiff.

II. In deciding that the defendants below were entitled to the land in dispute.

III. In holding and deciding that the defendants had acquired title to the land described in the complaint by adverse possession under the statutes of Utah.

IV. In not deciding that the legal title to the land described in the complaint remained in the United States until the patent therefor was issued by the United States to the Central Pacific Railroad Company on January 20, 1900.

V. In not deciding that the legal title to the land in controversy remained in the United States (notwithstanding the filing of its map of definite location by the Railroad Company) until the payment by the Railroad Company of "the cost of surveying, selecting and conveying" the land as required by Section 21 of the Act of 1864, and that in default of any evidence that this payment was ever made the title to the land remained in the United States until the patent was issued.

VI. In not holding and deciding that the defendants could not acquire any title to the land in question by adverse possession while the legal title thereto was in the United States.

VII. In not holding and deciding that the defendants could not acquire any title to the land by adverse possession against the plaintiff except by adverse possession after the grantor of the plaintiff had received the patent therefor from the United States.

FIRST POINT.

The legal title to the land in dispute remained in the United States until the patent therefor issued, and the statute of limitations did not commence to run against the plaintiff in error and its grantors until the patent for the land had been obtained from the United States.

It will no doubt be conceded that no title by adverse possession can be obtained as against the United States. It will probably also be conceded by counsel for the defendants in error that if the legal title to the land remained in the United States until the patent therefor was issued, then the judgment below must be reversed. At all events, the Court below in the course of its opinion (Record, p. 78) says:

> "But counsel for the appellant insist that the statute of limitations could only begin to run from the issuance of patent and that therefore the defense of adverse possession must fail. *This position would be sound if the legal title to the land had remained in the United States until the patent was issued, but such was not the case.*"

The single and important question, therefore, which presents itself upon this record is whether the legal title to the land remained in the government until the patent was issued. If it did, then the judgment below must be reversed. That it did would seem to be well established by the decisions of this Court.

The case of Redfield vs. Parks, 132 U. S., 239, was an action in the nature of an ejectment brought to recover the possession of certain real estate. The plaintiff had purchased the land in question at a judicial sale on a judgment against the Mississippi, Ouachita & Red River Railroad Company, and upon the trial the plaintiff relied upon and introduced in evidence a patent from the United States dated April 15, 1875, conveying the property to said Railroad Company. The defendants relied upon a deed made by the County Clerk of Lafayette County, Arkansas, on the 11th day of August, 1871, upon a sale for taxes for the year 1868, and upon adverse possession under the general statute of limitations of Arkansas of seven years. The action was commenced on the 11th day of April, 1882, and therefore within seven years from the date of the patent from the United States. The com-

plaint was dismissed in the Court below, and the judgment below was reversed by this Court. At page 243 it was said by Mr. Justice MILLER, as follows:

> "It is apparent from the finding of the facts that the action, which was commenced on the 11th day of April, 1882, was within the seven years allowed by the statute from the time that the cause of action accrued, if that is to be computed from the 15th day of April, 1875, the date of the patent introduced by plaintiff. That such is the law in regard to the action of ejectment in the courts of the United States has been repeatedly decided. The foundation of this rule is the proposition that time does not run against the government, that no statute of limitation affects the rights of the government, unless there is an express provision to that effect in the statute, and even then it cannot be conceded that state legislation can in this manner imperil the rights of the United States or overcome the general principle that it is not amenable to the statute of limitations or the doctrine of laches. The facts found in the present case leave it beyond question that the legal title to the property in controversy was in the United

States until the issuing of the patent to the railroad company.

"In the courts of the United States, where the distinction between actions at law and suits in equity has always been maintained, the action of ejectment is an action at law, and the plaintiff must recover on the legal title. If it be shown that the plaintiff has not the legal title, that the legal title at the time of the commencement of the action or at its trial is in some other party, the plaintiff cannot recover. The facts in the present case show that this title to the land in controversy was in the United States until the 15th day of April, 1875. *Up to that time the statute of limitations could not begin to run in bar of any action dependent on this title.* The plaintiff could not sue or recover in the courts of the United States upon the equitable title evinced by his certificate of purchase made by the register of the land office. His title, therefore, being derived from the United States, the right of action at law to oust the defendant did not commence until the making of that patent."

In the case of Gibson vs. Chouteau, 13 Wall., 92, the plaintiff brought ejectment to recover 64 acres of land in the county of St. Louis, Mo., and

claimed title to the land under a patent of the United States issued to his immediate grantor. It appeared upon the trial that the facts leading to the issuance of the patent were as follows:

In September, 1803, one O'Carroll settled by permission of the Spanish authorities on vacant lands in the district of New Madrid, in the territory of Louisiana. After the cession of Louisiana to the United States, O'Carroll claimed the land by virtue of his settlement and the claim was confirmed. In 1812, a large part of the land in the county of New Madrid was injured by earthquakes, including the land belonging to O'Carroll. In 1815, Congress passed an act for the relief of the parties who had suffered from the earthquakes aud authorized persons whose land had been materially injured to locate a like quantity of land on any of the public lands of Missouri.

In November, 1815, the recorder of land titles in St. Louis gave a certificate to the effect that the land of O'Carroll in New Madrid County had been injured by earthquakes, and stating that under the Act of Congress aforesaid, O'Carroll or his legal representatives were entitled to select a like quantity of land on any of

the public lands of the Territory of Missouri. In June, 1818, a location of land in the Territory of Missouri was made on behalf of one Christian Wilt who had become by mesne conveyances the owner of the interests of O'Carroll. From some unexplained cause, the survey and plat of this land was not returned to the recorder until August, 1841, when a patent certificate was issued to O'Carroll, or his legal representatives, and thereafter and in June, 1862, a patent was issued by the United States to Mary McRee, who had acquired by various mesne conveyances the interest of Wilt, and in August of the same year, she conveyed the land to the plaintiff.

Upon the trial, the defendants set up as a bar to the plaintiff's action that previous to the issue of the patent they had been in possession of the premises more than ten years, the period prescribed by the statute of Missouri within which actions for the recovery of real property must be brought. By the statutes of the State of Missouri, the action of ejectment will lie on certain equitable titles and could be maintained on a New Madrid location against any person not having a better title. The defendants therefore contended that

the statute of limitations which had run against the equitable title, created by the location of O'Carroll's claim, was also a bar to the action founded upon the legal title acquired by the patent of the United States. The trial court held that the patent from the United States having issued to Mrs. McRee within ten years next before the commencement of the suit, the possession of the defendants was not a bar to the plaintiff's recovery, and gave verdict and judgment accordingly for the plaintiff. The case was twice heard in the Supreme Court of the State, and upon the first hearing the Court affirmed the decision of the inferior court, holding that "until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of that patent." On the second hearing in the Supreme Court of the State, the Court reversed the decision of the inferior court, and held that the statute of limitations did run against the plaintiff before the date of the patent issued by the United States.

This Court, however, reversed the decision of the Court below and affirmed the judgment of the trial court. Mr. Justice FIELD in writing

the opinion of the Court said, at page 100, as follows:

> "The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."
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> * * * * * *
>
> "But neither in a separate suit in a Federal court, nor in an answer to an action of ejectment in a State court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the State, be held to constitute a sufficient equity in

> their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted."

In the case of Bagnell vs. Broderick, 13 Peters, 436, the plaintiff brought an action of ejectment for a section of land in Missouri, claiming title thereto by virtue of a patent from the United States dated June 17, 1820. It was said at page 450, as follows:

> "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; *until it issues the fee is in the government;* by the patent, it passes to the grantee, and he is entitled to recover the possession in ejectment."

In the case of Lindsey vs. Miller's Lessee, 6 Peters, 666, the plaintiff brought an action of

ejectment in the United States Circuit Court for the District of Ohio, to recover possession of a tract of land lying in what is called the Virginia Military District. On the trial the plaintiff exhibited a patent for the land bearing date December 1, 1824, and the defendants requested the Court to instruct the jury that the uninterrupted possession of the land for more than 21 years, was a bar to the plaintiff's recovery. The trial court refused to give this instruction. The plaintiff recovered a judgment in the Court below and the judgment was affirmed by this Court which said at p. 673, as follows:

> "That the possession of the defendants does not bar the plaintiff's action, is a point too clear to admit of much controversy. It is a well settled principle, that the statute of limitations does not run against a State. If a contrary rule was sanctioned, it would only be necessary for intruders upon the public lands, to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. In this way, the public domain would soon be appropriated by adventurers. Indeed, it would be utterly im-

practicable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government.

"The title under which the plaintiff in the ejectment claimed, emanated from the government in 1824. Until this time there was no title adverse to the claim of the defendants. There can, therefore, be no bar to the plaintiff's action."

In the case of Langdon vs. Sherwood, 124 U.S., 74, it was said at p. 85 as follows:

"If it (the patent) never issued, it is obvious that the legal title remains in the United States, and, according to the well-settled principles of the action of ejectment, the plaintiff cannot be entitled to recover in the action at law.

"To receive this evidence, and to give it the effect of proving a legal title in the holder of such a receipt, because the statute of the State proposes to give it such an effect, is to violate the principle asserted in Bagnell v. Broderick, that it is for the United States to fix the dignity and character of the evidences of title which issue from

> the government. And it is also in violation of the other principle settled by the cited decisions, that in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title, and that the courts of law do not enforce in that manner the equitable title evidenced by these certificates."

It is to be noticed that the Court below decided this case without in any way referring to the prior decision of the Court in the case of Steele vs. Boley, 7 Utah, 64, where it was held that the statute of limitations of Utah did not run against a patentee of public land from the date of the final payment for the land, but from the date of the issuance of the patent therefor by the United States. This case reversed the former decisions of the Utah courts upon the authority of Redfield vs. Parks, 132 U. S. The Court in speaking of the former decisions of the Court which were overruled, said as follows:

> "An examination of those cases will disclose the fact that all, or nearly all of them, are based on statutes which provide that such a certificate is proof of title equivalent to a patent against all but the holder of an actual patent, and the holder, therefore, of

such a certificate might maintain ejectment in the State courts of those States against one who had taken wrongful possession of the land described in the certificate, and, if he neglected to do so, the statute would run against him, and in favor of the one in possession. But since the former decision in this court the Supreme Court of the United States has held that, while the title to public land is still in the United States, no adverse possession of it can, under a State statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States against the legal title under a patent from the United States. Redfield v. Parks, 132 U. S. 239. * * * The decisions of that court are of binding authority upon this Court, and, under the authority of *Redfield v. Parks*, *supra*, we must hold that the District Court erred in admitting evidence of adverse possession by defendants prior to the issuing of the patent to plaintiff, and, in instructing the jury to find for defendants if they found the defendants had held continuous, open, and adverse possession of the premises in controversy for seven years before this action was begun by plaintiff."

It is difficult to see what distinction can be

drawn between the case of Steele vs. Boley and the present controversy. The Steele case virtually held that no title by adverse possession could be gained until there had been an open and adverse possession for the requisite number of years after the patent had issued.

It is also important in this regard to notice the language of the fourth section of the Act granting the land in question to the Central Pacific Railroad Company. By this section it is provided that upon certificate of the Commissioners to the effect that forty consecutive miles of the railroad and telegraph line had been completed and equipped in all respects, then

> "*patents shall issue conveying the right and title to said land* to said Company on each side of the road so far as the same is completed to the amount aforesaid."

The statute just quoted provides that "patents shall issue conveying the right and *title*" to the land in question. Of course, if the legal title had already passed by the grant itself, there would be no legal title to be conveyed by the patent. The statute, however, as we understand it, means that by the Act and the filing of the map of definite location, the railroad company

acquired an equitable title to the land, the United States holding the legal title in trust until a patent should issue. In other words, Congress by the act declared that a patent was necessary to complete the title. As to this, it was said in Wilcox vs. Jackson, 13 Peters, 498, 516, that "the property in question was a part of the public domain of the United States; Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. *Congress has declared, as we have said, by its legislation, that, in such a case as this, a patent is necessary to complete the title. But, in this case, no patent has issued; and, therefore, by the laws of the United States, the legal title has not passed, but remains in the United States.*"

The defendants in error rely upon and insist that the authorities to which we refer have been overruled by the case of Deseret Salt Company vs. Tarpey, 142 U. S., 241. It is true that in this case it was held that the legal title to lands granted to the Central Pacific Railroad Company passed to the Company upon the filing of its map of definite location. Our answer to this case is:

First. That the doctrine there decided has

always been limited by this Court to the particular facts arising in that case, and that such facts are in no way similar to the facts in the case at bar, there being no question in the Tarpey case as to whether the Statute of Limitations of a State began to run against a grantee from the Government prior to the issue of a patent for the land. The point decided by the Tarpey case was simply that the Railroad Company had a sufficient interest by reason of the filing of its map of definite location, to enable it to bring an action of ejectment.

Second. That the Tarpey case apparently overruled the case of Railroad Company vs. Prescott, 16 Wall., 603, without once referring to the Prescott case in the decision, and that the principle decided in Railroad Company vs. Prescott has since the Tarpey case been reaffirmed by this Court in the case of Ankeny vs. Clark, 148 U. S., 345.

Third. That the case of Wisconsin Railroad Co. vs. Price County, 133 U. S., 496, relied upon by the Court in the Tarpey case does not hold that the legal title to the land there in question passed to the Railroad Company prior to a patent from the United States, as the Court was par-

ticular to hold in the Price County case that that question was not necessary for it to decide, saying at page 511, as follows:

> "The lands had become the property of the railroad company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government."

Fourth. While the court in the Tarpey case held that the legal title to the land granted to the Central Pacific Railroad Company passed to the railroad at the time of filing its map of definite location, yet, at the same time, it held that the land was still subject to the control of the United States. It is certainly difficult to understand how the legal title could have passed prior to the issuance of the patent, and yet that the land should remain subject to the control of the Government.

Although in a certain sense the title to the land in dispute may have passed to the railroad at the time of the filing of its map of definite location under the ruling in the Tarpey case (*supra*),

yet it was only a conditional fee, as is shown by the opinion of Mr. Justice FIELD, at page 252, where he says :

> "Whilst a legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed to the railroad company by the act of Congress, upon the definite line of the road being once established, by which the sections could be ascertained and identified, *the lands could not be disposed of by the company without the consent of Congress*, except as each twenty-mile section of the road was completed and accepted by the President, so as to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the railroad and telegraph line, and it is manifest, from different provisions of the act, that Congress intended to secure this application of them. *Whatever disposition might be made by the Company of the lands after they became, by the definite location of the road, capable of identification, they were subject to the control*

> *of Congress, either to compel their application for the construction of the road contemplated, or to enforce their forfeiture if the road was not completed as required by the act.* The application of the lands to the construction would not, of itself, operate to transfer the title; it would only remove the restriction upon the use and disposition of the title already possessed."

The only conclusion from these words is that while the railroad, by filing the map of definite location, obtained a legal title sufficient to enable it to bring an action of ejectment, yet it was a conditional title of such a character as (to use the words of Mr. Justice WHITE in Northern Pacific Railway v. Townsend, 190 U. S., 267) to be "inconsistent with the power in an individual to acquire, for private purposes, by limitation," any of the land granted until a patent therefor had issued from the government.

In other words, the title acquired by the railroad company at the time it filed its map of definite location was not a full legal title in fee simple absolute, but was a conditional title subject to being divested by the United States. To put it in another form, both the United States

and the railroad, after the filing of the map of definite location by the railroad company, held an interest in the land in dispute, and, as an individual cannot acquire a title by adverse possession to lands in which the United States has any interest, the character of the title was such, resulting from this joint interest, that an individual could not, at the time of filing the map of definite location, acquire the land for private purposes by limitation.

Fifth. That, as we understand it, the Tarpey case has been substantially overruled by the case of Ankeny vs. Clark, 148 U. S., 345, where it was held that,

> "A title derived from a land grant railroad company *which has not received a patent*, by reason of failure to pay the costs of surveying, is not a title which a party who has contracted for a deed of the land and has paid the purchase price therefor, is obliged to accept." (*Syllabus.*)

In other words, the railroad company by filing its map of definite location has not acquired a marketable title to the land or what is the same thing a legal title, but simply an equitable title which will become a legal title upon the issue of

a patent for the land by the United States or possibly upon the payment of the cost of surveying, etc.

Sixth. The case of Barden vs. Northern Pacific Railroad Co., 154 U. S. 288, if it does not overrule the case of the Deseret Salt Co. vs. Tarpey (*supra*) certainly limits the doctrine of that case to the particular circumstances then before the Court. The Barden case was an action of ejectment brought by the Northern Pacific Railroad Co. to recover the possession of lands granted to it by the United States under the act of Congress of July 2, 1864. The Railroad Company had filed its map of definite location July 6, 1882. Under the ruling, therefore, in the Tarpey case, the railroad company had the legal title to the land, and was entitled under its pleading to recover the same. The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled in the court below, and leave given to the defendants to answer. This they declined to do, and decided to abide by the demurrer. The case was brought to this court by writ of error, and the judgment below reversed, and the case remanded to the

Circuit Court, with directions to sustain the demurrer of the defendants upon the ground that the mere allegation in the complaint that the land had been granted to it by the United States under the Act of Congress of July 2, 1864; that the map of definite location had been properly filed and a report to that effect made by the commissioners to the President of the United States, was not sufficient to make a *prima facie* case of a legal title in the plaintiff to the land in question.

It is not plain why the Barden case does not overrule the Tarpey case. Both were actions of ejectment. In the Tarpey case it was held by this Court that the Railroad Co. acquired the legal title to the land under the grant from the government at the time of filing its map of definite location at least for the purpose of bringing an action of ejectment. In the Barden case it was held that the filing of the map of definite location was not sufficient to enable the Railroad Co. to bring an action of ejectment to recover possession of lands granted to it by the United States. It is not clear how the two cases can be reconciled. In any event it would seem to have been the intention of the court by its decision in

the Barden case to limit the doctrine of the Tarpey case to the identical facts of that case.

In the case of Corrinne Co. vs. Johnson, 156 U. S., 574, the plaintiff brought an action to recover possession of real estate, claiming title thereto under the Central Pacific Railroad Company, it being contended that the lands were within the grant made by the Acts of Congress of 1862 and 1864, and that by reason of the admitted completion of the road, the title had passed to the railroad company. The trial Court in its instructions to the jury expressed the opinion that the plaintiff had failed to prove any title. The statement on motion for a new trial and appeal signed by the trial Judge did "*not contain any patent from the Government for the lands.*" The trial resulted in a verdict and judgment for the defendant, and in this Court the judgment was affirmed, Mr. Justice BREWER saying, at page 576 :

> "*Proof that the road had been located and completed* and that the tracts claimed were odd numbered sections within the twenty-mile limit, *was not sufficient to establish title in the company.* * * *
>
> "Now the defect in this record which is

> fatal to the case of the plaintiff in error is that nowhere is it shown that all the testimony received on the trial is preserved. Under such circumstances *we are not at liberty to assume that there was in evidence a patent, or other instrument of itself working a transfer of the legal title from the government to the railroad company.*"

As we understand this case, this Court held that the legal title did not pass from the United States to the Railroad Company simply by reason of the filing by the latter of its map of definite location. It would seem, therefore, that the Corrinne Company case held a contrary doctrine to that declared in the case of Deseret Salt Company vs. Tarpey (*supra*).

Counsel for the defendants in error also seem to rely with considerable confidence on the case of Langdeau vs. Hanes, 21 Wall., 521. If we understand correctly the facts in this case, it would seem to have no bearing whatever upon the question now before the Court. In the Langdeau case the State of Virginia, which, prior to the Revolution, had asserted title to the northwest territory had always respected the titles of the French and Canadian inhabitants, who had

declared themselves her citizens. When she ceded the northwest territory to the United States she stipulated by the express terms of her grant that the titles which these French and Canadians then had should be confirmed by the United States, and the United States in accepting the grant bound itself to perform the stipulation. In other words, any French or Canadian inhabitant of the northwest territory who had, prior to the cession by the State of Virginia to the United States, acquired the title to any of the land and had declared himself a citizen of the State of Virginia, was entitled to have such title confirmed by the United States. Of course in a controversy subsequently arising in an action of ejectment as to the title to land derived by mesne conveyances from the French and Canadian citizens of Virginia prior to the cession of the northwest territory, the defendant was entitled to claim that his adverse possession of the land did not begin to run from the date of the patent from the United States to the plaintiff, for the reason that the plaintiff did not obtain any title to the land from the United States at all, but had acquired his title to the land years before and prior to the cession of the northwest territory to

the United States, and that the patent from the United States issued subsequently to such cession was simply a patent confirming the previous title in accordance with the stipulation contained in the grant from the State of Virginia to the United States.

We, therefore, confidently submit that the Langdeau case is no authority here, and that the questions in the case at bar were not in any way there considered by this Court. This is clear from the statement in the opinion at page 531, where it was said:

> "The plaintiff can therefore derive no aid from the patent issued in 1872. The doctrine which his counsel invokes that the legislation of a State cannot defeat or impair the rights conferred by a patent of the United States in advance of its issue *is sound when properly applied*, but it has no application here. * * * Here, in any view that may be taken the title was perfected in the heirs of Tongas more than half a century before the patent issued."

It is important to notice the provision in section 21 of the Act of Congress of July 2, 1864, which is as follows:

> "That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States, the cost of surveying, selecting and conveying the same by the said company or party in interest as the title shall be required by said company."

This section of the statute has been construed by this Court in the cases of Railway Co. vs. Prescott, 16 Wall., 603; Railway Co. vs. McShane, 22 Wall., 444; Northern Pacific Railroad vs. Traill County, 115 U. S., 600, and Ankeny vs. Clark, 148 U. S., 345; and it has invariably been held that a railroad company, notwithstanding the fact that it has filed its map of definite location, does not acquire a legal title to the land until the cost of surveying, selecting and conveying the same has been paid by the railroad company to the United States.

In the case of Ankeny vs. Clark (decided after the case of Deseret Salt Co. vs. Tarpey) the plaintiff sought to recover the consideration which he had paid to the defendant for certain land, upon the ground that the defendant did not have and was unable to convey to him a good

title thereto. The defendant in his answer claimed that his title which he had derived from the Northern Pacific Railroad Company was good, inasmuch as the legal title to the land had passed to the railroad company by reason of the filing by the company of its map of definite location, and that it was to be presumed that the cost of surveying, etc., had been paid by the railroad company to the United States. This Court, however, held that there was no such presumption, and in the absence of any averment in the pleadings or any stipulation to that effect, the defendant had no title to the land, saying at page 358, as follows:

> "Turning to the pleadings and to the stipulation as to the facts, we find that the defendant did not aver in his answer, nor was it admitted in the stipulation that the railroad company had complied with the necessary conditions as to payment of costs of survey, nor was it alleged or admitted that a patent had been issued to the railroad company for the lands in question. The plaintiff having alleged want of title in the defendant, and the latter having met that allegation only by the admission in the stipulation that the railroad company had

> filed its map of definite location and had constructed its road to the satisfaction of the President, we think that the court below was warranted in holding that the defendant's title was imperfect, and that there was no question of fact to submit to the jury."

An examination of the pleadings and of the stipulations in this case fails to disclose that the cost of surveying, selecting and conveying the lands involved in this suit has been paid by the railroad company to the United States. It is true that the patent for the land was issued January 20, 1900. Possibly the cost of surveying, etc., was paid before the patent was issued. If the cost of surveying was ever paid, it does not appear by the record when this was done and how long before the granting of the patent. It may have been a week before, it may have been at the very time of the issue of the patent, or it may not have been at all. In other words, under the four decisions of this Court to which we have just referred, the legal title of the plaintiff in error to the land in question was not acquired at least until the payment of the cost of surveying, etc. This date the defendant in error has failed to prove. The Statute

of Limitations of Utah certainly cannot begin to run against the plaintiff in error until it obtained the legal title to the land and the defendants in error, who claim title by adverse possession, must certainly prove the date of the acquiring of the legal title by the plaintiff in error before they can sustain their contention of title by adverse possession. The position of the plaintiff in error is that it acquired the legal title to the land upon the date of the patent from the Government. The claim of the defendants in error is that the plaintiff in error and its grantors acquired a legal title to the land when the railroad company filed its map of definite location. This Court has, however, held otherwise and has definitely determined that the legal title did not pass to the railroad until the cost of surveying, etc., was paid to the United States as required by the Act of 1864, and, if not paid, then of course not until the patent was issued. In absence of proof in the record that cost of surveying was paid, the inference is that it never was, and that title to the land remained in the United States until patent issued.

We therefore confidently submit that upon the four cases decided by this Court and last referred to by us, the plaintiff in error did not acquire

the legal title to the land in question prior to the payment by the railroad company of the cost of surveying, etc., the land in dispute. The date when this was done, if done at all, does not appear in the record. If done at all, it may have been at the time of the issuance of the patent. The defendants in error have not shown when the legal title to the land passed from the United States to its grantee prior to the patent (if at all) and have therefore failed to show that since the legal title passed out of the United States they have had possession of the land for the requisite number of years under the Utah law to bar the claim of the plaintiff in error.

If the Court should hold in the present case that the defendants in error had acquired a valid title to this land by adverse possession, the effect would be to take it from the railroad which had earned it and give it, not to a homestead settler, but to a squatter pure and simple. This Court has never yet held that the lands under the Pacific Railroad grants could be taken from the railroads by squatters. If it should do so now the result would be that "in this way the public domain would soon be appropriated by adven-

turers" (Lindsey vs. Miller's Lessee, 6 Pet., 666, 673).

To repeat briefly our position, we contend that the legal title to the land in dispute as far as the case at bar is concerned did not pass out of the United States at the time the Railroad Company filed its map of definite location, but remained in the United States until the patent therefor was issued for the following reasons:

First. That this Court has held that under the Pacific land grants the title to the land granted remained in the United States until the cost of survey had been paid (Railway Co. vs. Prescott, 16 Wall., 603; Railway Co. vs. McShane, 22 Wall., 444; Northern Pacific Railroad vs. Traill County, 115 U. S., 600; Ankeny vs. Clark, 148 U. S., 345) and that there is no evidence in the present case that the cost of survey has been paid, or that the land ever was surveyed.

Second. That this Court has held that the Railroad Company under a land grant acquired no legal title to the land simply by filing its map of definite location (Ankeny vs. Clark, 148 U. S., 345; Barden vs. Northern Pacific Railroad Co., 154 U. S., 288).

Third. That the 4th section of the Act of July, 1862, provides that "patents shall issue conveying the right and *title* to said land."

Fourth. That the right to assert adverse possession against the grantee of the government prior to the issue of a patent was not in anyway considered or decided in the case of Deseret Salt Co. vs Tarpey, 142 U. S., 241.

Fifth. That the title (if any) acquired by the Railroad Company at the time of filing its map of definite location was a conditional fee and of such a character that the defendants in error could not acquire the land by limitation, as the United States still had an interest therein.

SECOND POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
T. D. JOHNSON,
Of Counsel for Plaintiff in Error.

APPENDIX

Act of Congress Approved July 1, 1862 (12 U. S. Stat., 489).

CHAP. CXX.—AN ACT to aid in the construction of a Rail Road and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other purposes, approved July 1, 1862.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled : That Walter S. Burgess, William P. Blodget, Benjamin H. Cheever, Charles Fosdick Fletcher, of Rhode Island ; Augustus Brewster, Henry P. Haven, Cornelius S. Bushnell, Henry Hammond, of Connecticut ; Isaac Sherman, Dean Richmond, Royal Phelps, William H. Ferry, Henry A. Paddock, Lewis J. Stancliff, Charles A. Secor, Samuel R. Campbell, Alfred E. Tilton, John Anderson, Azariah Boody, John S. Kennedy, H. Carver, Joseph Field, Benjamin F. Camp, Orville W. Childs, Alexander J. Bergen, Ben. Holliday, D. N. Barney, S. De Witt Bloodgood, William H. Grant, Thos. W. Olcott, Samuel B. Ruggles, James B. Wilson, of New York ; Ephraim Marsh, Charles M. Harker, of New Jersey ; John Edgar Thompson, Benjamin Haywood, Joseph H. Scranton, Joseph Harrison, George W. Cass, John H. Bryant, Daniel J. Morell, Thomas M. Howe, William F. Johnson, Robert Finney, John A. Green, E. R. Myre, Charles F. Wells, Jr., of Pennsylvania ; Noah L. Wilson, Amasa Stone, William H. Clement, S. S. L'Hommedieu, John Brough, William Dennison, Jacob Blickinsderfer, of Ohio ; William M. McPherson, R. W. Wells, Willard P. Hall, Armstrong Beatty, John Corby, of Missouri ; S. J. Hensley, Peter Donahue, C. P. Huntington, T. D. Judah, James Bailey, James T. Ryan, Charles Hosmer, Charles Marsh, D. O. Mills, Samuel Bell, Louis McLane, George W. Mowe,

Charles McLaughlin, Timothy Dame, John R. Robinson, of California ; John Atchinson and John D. Winters, of the Territory of Nevada ; John D. Campbell, R. N. Rice, Charles A. Trowbridge and Ransom Gardner, Charles W. Penny, Charles T. Gorham, William McConnell, of Michigan ; William F. Coolbaugh, Lucius H. Langworthy, Hugh T. Reid, Hoyt Sherman, Lyman Cook, Samuel R. Curtis, Lewis A. Thomas, Platt Smith, of Iowa ; William B. Ogden, Charles G. Hammond, Henry Farnum, Amos C. Babcock, W. Seldon Gale, Nehemiah Bushnell, and Lorenzo Bull, of Illinois ; William H. Swift, Samuel T. Dana, John Bertram, Franklin S. Stevens, Edward R. Tinker, of Massachusetts ; Franklin Gorin, Laban J. Bradford and John T. Levis, of Kentucky ; James Dunning, John M. Wood, Edwin Noyes, Joseph Eaton, of Maine; Henry H. Baxter, George W. Collamer, Henry Keyes, Thomas H. Canfield, of Vermont ; William S. Ladd, A. M. Berry, Benjamin F. Harding, of Oregon ; William Bunn, Jr., John Catlin, Levi Sterling, John Thompson, Elihu L. Phillips, Walter D. McIndoe, T. B. Stoddard, E. H. Broadhead, A. H. Virgin, of Wisconsin ; Charles Paine, Thomas A. Morris, David C. Branham, Samuel Hanna, Jonas Votaw, Jesse L. Williams, Isaac C. Elston, of Indiana ; Thomas Swan, Chauncey Brooks, Edward Wilkins, of Maryland ; Francis R. E. Cornell, David Blakely, A. D. Seward, Henry A. Swift, Dwight Woodbury, John McKusick, John R. Jones, of Minnesota ; Joseph A. Gilmore, Charles W. Woodman, of New Hampshire ; W. H. Grimes, J. C. Stone, Chester Thomas, John Kerr, Werter R. Davis, Luther C. Challis, Josiah Miller, of Kansas ; Gilbert C. Monell and Augustus Kountz, T. M. Marquette, William H. Taylor, Alvin Saunders, of Nebraska ; John Evans, of Colorado ; together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic in deed and in law, by the name, style, and title of " The Union Pacific Rail Road

Company;" and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out locate, construct, furnish, maintain, and enjoy a continuous rail road and telegraph, with the appurtenances, from a point on the one-hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the Territory of Nebraska, to the western boundary of Nevada Territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the Board of Commissioners of the Union Pacific Rail Road and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said Board shall be held at Chicago, at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners by depositing a call thereof in the post office at Chicago, post paid, to their address, at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and St. Louis. Said board shall organize by the choice from its number of a president, secre-

tary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said Board of Commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said Board of Commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least thirty days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription books, and other books in the possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease to determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and each triennial election of directors by the stockholders, two additional directors shall be appointed by the President of the the United States, who shall act with the body of directors, and to be denominated directors on the part of the Gov-

ernment; any vacancy happening in the Government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Rail Road Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a bona fide owner of ai least five shares of stock in said company, except the two directors to be appointed by the President, as aforesaid. Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations, as they shall deem needful and proper touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice, at such times and in such proportions as they shall deem necessary to complete the rail road and telegraph within the time in this act prescribed. Said president, vice-president and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the directors. Annual meetings of the stockholders of the said

corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business, shall be holden at such time and place upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said rail road and telegraph line ; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof ; said right of way is granted to said rail road to the extent of two hundred feet in width on each side of said rail road where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby granted to the said company, for the purpose of aiding in the construction of said rail road and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed ; *provided*, That all mineral lands shall be excepted from the operation of this act ; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three

years after the entire road shall have been completed' shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive mlles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first class rail road, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and to report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said rail road and telegraph line have been completed and equipped in all respects as required by this act, then upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said rail road and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned, the Secretary of the Treasury

shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the rail road and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of the said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, this section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said rail road and telegraph line in repair and use, and shall at all times transmit despatches over said tele-

graph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said rail road for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 7. *And be it further enacted*, That said Company shall file their assent to this act, under the seal of said Company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada Territory, before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act said Company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named; *Provided*, That in fixing the point of connection of the main trunk with the eastern connections it shall be fixed at the most prac-

ticable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

SEC. 8. *And be it further enacted*, That the line of said rail road and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the Territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Rail Road Company of California.

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee and Western Rail Road Company of Kansas are hereby authorized to construct a rail road and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the rail road and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas rail road before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said rail road through Kansas shall be so located between the mouth of the Kansas river, as aforesaid, and the aforesaid point on the one hundredth meridian of longitude, that the several rail roads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, pro-

vided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas west of the meridian of Fort Riley, to the aforesaid point on the one hundredth meridian of longitude to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas Company may proceed to build said rail road to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska. The Central Pacific Rail Road Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a rail road and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said rail road and telegraph line first mentioned, and to meet and connect with the first mentioned rail road and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

SEC. 10. *And be it further enacted*, That the said Company chartered by the State of Kansas shall complete the one hundred miles of their said road, commencing at the mouth of the Kansas river, as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Rail Road Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads respectively, said companies, or either of them, may unite upon equal terms with the first named company in constructing so

much of said rail road and telegraph line and branch rail roads and telegraph lines in this act hereinafter mentioned, through the Territories from the State of California to the Missouri river, as shall then remain to be constructed on the same terms and conditions as provided in this act in relation to the said Union Pacific Rail Road Company. And the Hannibal and Saint Joseph Rail Road, the Pacific Rail Road Company of Missouri, and the first named Company or either of them, on filing their assent to this act as aforesaid, may unite upon equal terms, under this act, with the said Kansas Company, in constructing said rail road and telegraph, to said meridian of longitude, with the consent of the said State of Kansas; and in case said first named company shall complete their line to the eastern boundary of California, before it is completed across said State by the Central Pacific Rail Road Company of California, said first named Company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until the said roads shall meet and connect, and the whole line of said rail road and telegraph is completed; and the Central Pacific Rail Road Company of California, after completing its road across said State, is authorized to continue the construction of said rail road and telegraph through the territories of the United States to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Rail Road Company, until said roads shall meet and connect, and the whole line of said rail road and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit: one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly

from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said rail road and telegraph.

SEC. 12. *And be it further enacted*, That whenever the route of said rail road shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route, and in case of difference between them as to said location the President of the United States shall determine the said location; the companies named in each State and Territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of rail road and branches shall be of uniform width, to be determined by the President of the United States, so that when completed, cars can be run from the Missouri river to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio rail road; the whole line of said rail road and branches and telegraph shall be operated and used for all purposes of communication, travel and transporta-

tion, so far as the public and Government are concerned, as one connected continuous line; and the companies herein named in Missouri, Kansas and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and furnishing said first mentioned line between the aforesaid point on the one hundredth meridian of longitude and western boundary of Nevada Territory whenever the same is required by said first-named, company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

SEC. 13. *And be it further enacted*, That the Hannibal and Saint Joseph Rail Road Company of Missouri may extend its roads from Saint Joseph, *via* Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions in all respects, for one hundred miles in length next to the Missouri river, as are provided in this act for the construction of the rail road and telegraph line first mentioned, and may for this purpose use any rail road charter which has been or may be granted by the legislature of Kansas: *Provided*, that if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from St. Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee and Western Rail Road Company of Kansas may construct their road from Leavenworth, to unite with the road through Kansas.

SEC. 14. *And be it further enacted*, that the said Union Pacific Rail Road Company is hereby authorizad and required to construct a single line of road and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said rail road and telegraph first mentioned; and the said Union Pacific Rail Road Company shall complete one hundred miles of the road and telegraph in this section provided for in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: *Provided*, that a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section, and to operate said road in the same manner as the main line shall be operated, shall forfeit to the Government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of rail road completed through Minnesota or Iowa to Sioux City, then the said Pacific Rail Road Company is hereby authorized and required to construct a rail road and telgraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch rail road and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Rail Road, said point of junction to be fixed by the President of the United States, not further west than the one hundredth meridian of longitude aforesaid, and on the same terms

and conditions as provided in this act for the construction of the Union Pacific Rail Road as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City rail road and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch rail road and telegraph hereinbefore mentioned.

SEC. 15. *And be it further enacted*, That any other rail road company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors and assigns, the same as if the words had been properly added thereto.

SEC. 16. *And be it further enacted*, That at any time after the passage of this act all of the rail road companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said rail road and branches and telegraph line, upon the terms and conditions provided in this act.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said rail road and telegraph line to be thereafter devoted

to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed, so as to form a continuous line of rail road, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all said rail roads before mentioned, and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States; *Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountains, there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States Treasury, undelivered, until said road, and all parts thereof provided for in this act, are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the Treasury until the whole of the road provided for in this act is fully completed; and if the said road, or any part thereof, shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum

to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said rail road and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time having due regard for the rights of said companies named herein add to, alter, amend, or repeal this act.

SEC. 19. *And be it further enacted*, That the several rail road companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said rail road and branches as fast as said roads and braches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said rail road and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment, on the part of said rail road companies, of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of rail road herein contemplated, without prejudice to the rights of said rail road companies named herein.

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith under the provisions of this act, shall make to the Secretary of the Treasury an annual report, wherein shall be set forth:

First. The names of the stockholders and their places of residence, so far as the same can be ascertained.

Second. The names and residences of the directors, and all other officers of the company.

Third. The amount of stock subscribed, and the amount thereof actually paid in.

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such survey.

Fifth. The amount received from passengers on the road.

Sixth. The amount received for freight thereon.

Seventh. A statement of the expense of said road and its fixtures.

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof; which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.

Approved July 1, 1862.

Act of Congress Approved July 2, 1864 (13 U. S. Stat., 356).

CHAP. CCXVI.—AN ACT *To amend an Act entitled "An Act to aid in the construction of a Rail Road and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other purposes," approved July first, eighteen hundred and sixty-two.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Rail Road Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars, each; that the number of shares shall be one million, instead of one hundred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by government) shall be fifty shares, instead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars, heretofore subscribed, shall be entitled to a certificate for ten shares of one hundred dollars each; and that the following words in section first of said act: "which shall be subscribed for and held in not more than two hundred shares by any one person," be, and the same are hereby repealed.

SEC. 2. *And be it further enacted*, That the Union Pacific Rail Road Company shall cause books to be kept open to receive subscriptions to the capital stock of said company, (until the entire capital of one hundred millions of dollars shall be subscribed,) at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati, and St. Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor shall,

at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five dollars per share, and at intervals of not exceeding six months from and after the passage of this act, until the par value of all shares subscribed shall be fully paid; and money only shall be receivable for any such assessment, or as equivalents for any portion of the capital stock hereinbefore authorized. The capital stock of said company shall not be increased beyond the actual cost of said road. And the stock of the company shall be deemed personal property, and shall be transferable on the books of the company, at the general office of said company in the City of New York, or at such other transfer office as the company may establish.

SEC. 3. *And be it further enacted*, That the Union Pacific Rail Road Company, and all other companies provided for in this act and the act to which this is an amendment be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station houses, or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its roadbed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any

party to any judge of a court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owners thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained: but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the Territory or subject to any legal disability, the court may appoint a proper person who shall give bonds with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceeding shall be had in reference to the appraisement of the premises to be taken and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of

any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad and may institute proceedings in manner described for the purpose of ascertaining the value of and acquiring a title to the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred. It shall be competent for the legal guardian of any infant or any other person under guardianship to agree with the proper company as to damages sustained by the reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company which shall vest the title thereto in the said company.

SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting lieu thereof the word "twenty-five." And in the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And

any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvement as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, that the quantity thus exempted by the operation of this act and the act to which this is an amedment, shall not exceed 160 acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided*, also, that the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "An act donating lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts;" approved July 2, 1862, and notice given thereof at the proper land office.

SEC. 5. *And be it further enacted*, That the time for designating the general route of said rail road, and of filing the map of the same, and the time for the completion of that part of the rail roads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated; and that the Central Pacific Rail Road Company of California shall be required to complete twenty-five miles of their said road in each year there-

after, and the whole to the State line within four years, and that only one-half of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads.

SEC. 6. *And be it further enacted*, That the proviso to section four of said act is hereby modified as follows, viz: And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this is amendatory; and the verified statement of the president of the California Company, required by said section four, shall be filed in the office of the United States surveyor general for the State of California, instead of being presented to the President of the United States; and the said surveyor general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said rail road and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed and such rail road and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said rail road company of California of any portion of not less than twenty consecutive miles of their said rail road and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting, after the words "United States," in the last clause, the words "and States intervening."

SEC. 7. *And be it further enacted*, That so much of

section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said rail roads is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this act, and the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said rail road, and of enabling the said company as early as practicable to commence the grading of said rail road in the region of the mountains, between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required *required* to prepare the road for the superstructure on any such section of twenty miles is done, (which said certificate shall be duly verified,) the Secretary of the Treasury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two-thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case exceeding two-thirds of the value of the work done. The remaining one-third to remain until the said section is fully completed and certified by the commissioners appointed by the President, according to the terms and provisions of the said act. And no such bonds shall issue to the Union Pacific Rail Road Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said rail road from the point of beginning on the one hundredth meridian of longitude.

SEC. 9. *And be it further enacted*, That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers for the convenience of said road: *Provided*, That any bridge or bridges it may construct over the Missouri river, or any other navigable river on the line of said road, shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained, at the expense of said company in such manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do: *And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid may construct its road and telegraph line so as to connect with the Union Pacific rail road at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act: *Provided further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific rail road on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Rail Road Company, the Central Pacific Rail

Road Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective rail road and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

SEC. 11. *And be it further enacted*, That if any of the rail road companies entitled to bonds of the United States or to issue their first mortgage bonds herein provided for, has, at the time of the approval of this act, issued or shall thereafter issue any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority or preference of payment to the said guaranteed bonds, or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds, shall be granted, or permitted, as added to such outstanding, unsatisfied, or uncancelled bonds of the company, shall make up the whole amount per mile to which the company would otherwise have been en-

titled: *And provided further*, That before any bonds shall be so given by the United States, the company claiming them shall present to the Secretary of the Treasury an affidavit of the president and secretary of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the Secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the Secretary of the Interior, and any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and on conviction thereof, shall be punished as aforesaid; *Provided also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road, or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act and the act amended by this act.

SEC. 12. *And be it further enacted*, That the Leavenworth, Pawnee, and Western Rail Road Company, now known as the Union Pacific Railroad Company, eastern division, shall build the rail road from the mouth of Kansas river, by the way of Leavenworth, or, if that be not deemed the best route, then the said company shall, within two years, build a rail road from the City of Leavenworth to unite with the main stem at or near the City of Lawrence; but to aid in the construction of said branch the said Company shall not be entitled to any bonds. And if the Union Pacific Rail Road Company shall not be proceeding in good faith to build the said rail road through the Territories when the Leavenworth, Pawnee, and Western Rail Road Company, now known as the Union Pacific Rail Road Company, eastern division, shall have completed their road to the hundredth degree of longitude, then the last named company may proceed

to make said road westward until it meets and connects with the Central Pacific Rail Road Company on the same line. And the said rail road from the mouth of Kansas river to the one hundredth meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns: *Provided*, That no bonds shall be issued or land certified by the United States to any person or company for the construction of any part of the main trunk line of said rail road west of the one hundredth meridian of longitude and east of the Rocky Mountains, until said road shall be completed from or near Omaha, on the Missouri river, to the said one hundredth meridian of longitude.

SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them, touching the condition, management, and progress of the work: and shall communicate to the Secretary of the Interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed; and while absent from home, attending to their duties as directors, shall be paid their actual traveling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

SEC. 14. *And be it further enacted*, That the next election for directors of said rail road shall be held on the first Wednesday of October next, at the office of said company in the City of New York, between the hours of ten o'clock a. m. and four o'clock p. m. of said day; and all subsequent regular elections shall be held annually thereafter at the same place; and the directors shall hold their offices for one year, and until their successors are qualified.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. And it shall not be lawful for the proprietors of any line of telegraph authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured, for each effense, the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure, to be sued for and recovered in any court of the United States, or of any State or Territory of competent jurisdiction.

SEC. 16. *And be it further enacted*, That any two or more of the companies, authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act or the laws of the State or States in which the roads of such companies

may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guarantees, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which said companies, respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated, respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case, upon the completion by such consolidated organization of the roads or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so

be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guarantees, acts, and things to be done and performed by the goverment of the United States, by the President of the United States, by the Secretaries of the Treasury and Interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company, the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless,* That said defaulting company may at any time before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits, and privileges which shall be acquired, possessed, or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits, and privileges hereinbefore granted to such other company. And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions of this

section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force, and effect to the other: *Provided, however*, That rights and interests at any time acquired by one such consolidated organization shall not be impaired by another thereof. It is further provided that, should the Central Pacific Rail Road Company of California complete their line to the eastern line of the State of California before the line of the Union Pacific Rail Road Company shall have been extended westward so as to meet the line of said first-named Company, said first-named Company may extend their line of road eastward one hundred and fifty miles, on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and upon doing so shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Rail Road Company.

SEC. 17. *And be it further enacted*, That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby, amended so as to read as follows: That whenever a line of rail road shall be completed through the States of Iowa or Minnesota to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of rail road and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Rail Road from Omaha, or the Union Pacific Rail Road, as such company may select, and

on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of said Union and Pacific Rail Road and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: *Provided*, That said Union Pacific Rail Road Company shall be, and is hereby, released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Rail Road Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch; *And provided further*, That if a rail road should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construction of said branch as contemplated by the provisions of this act: *Provided, however*, That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Rail Road within ten years from the passage of this act, then, and in that case, all of the rail road which shall have been constructed by said company shall be forfeited to and become the property of the United States.

SEC. 18. *And be it further enacted*, That the Burlington and Missouri River Rail Road Company, a corporation organized under and by virtue of the laws of the State of Iowa, be, and hereby is, authorized to extend its road through the Territory of Nebraska from the point where it strikes the Missouri river, south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practi-

cable route, with the main trunk of the Union Pacific Rail Road, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude. And for the purpose of enabling said Burlington and Missouri River Rail Road Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops, depots, machine shops, switches, side tracks, turn tables, and water stations. And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

SEC. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River Rail Road Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the Secretary of the Interior, and shall also establish the line of said road, and file a map thereof with the Secretary of the Interior within one year of the date of said acceptance,

when the said Secretary shall withdraw the lands embraced in this grant from market

SEC. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Rail Road Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid; and such examination, report and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners, fill vacancies in said commission, as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the privileges and immunities granted to the Hannibal and St. Joseph's Rail Road Company by the said last mentioned act, so far as the same may be applicable: *Provided*, That no Government bonds shall be issued to the said Burlington and Missouri River Rail Road Company to aid in the construction of said extension of its road; and provided further, that said extension shall be completed within the period of ten years from the passage of this act.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, or party in interest as

the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the Commissioner of the General Land Office, for the prosecution of the survey of the public lands along the line of said road, and so from year to year, until the whole shall be completed, as provided under the provisions of this act.

SEC. 22. *And be it further enacted*, That Congress may at any time, alter, amend, or repeal this act.

Approved July 2, 1864.

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Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 48.

TOLTEC RANCH COMPANY,
Plaintiff in Error,

vs.

GEORGE COOK AND OTHERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Supplemental Brief in Behalf of Plaintiff in Error.

MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 48.

TOLTEC RANCH COMPANY,
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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH:

Supplemental Brief in Behalf of Plaintiff in Error.

I.

The latest decision of this Court stating how a Federal question must be set up or claimed in the record in order to enable this Court to take jurisdiction under Section 709 of the United States Revised Statutes is the case of Home for Incurables vs. City of New York, 187 U. S., 155, 157, where it was said as follows:

> "In Parmelee v. Lawrence, 11 Wall., 36, 38, this court * * * said it was essential to our

jurisdiction in re-examining the judgment of the State court that the alleged conflict between the State law and the Constitution of the United States 'appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court,' or 'it must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it.' "

See, also,

Dewey vs. Des Moines, 173 U. S., 193.
Meyer vs. Richmond, 172 U. S., 82.

An examination of the record in case No. 48 shows that the requirements imposed by this Court have been fully complied with. Upon the trial the plaintiff introduced in evidence a patent from the United States for the land in question and, when the defendants at page 30 of the record undertook to introduce evidence as to adverse possession prior to the date of the patent, the plaintiff's counsel made the following objection which was overruled by the Court :

" We object as incompetent, immaterial and irrelevant. Under the issues in this case the statute of limitations is attempted to be set up herein against us and under the proof that has been introduced on behalf of the plaintiff, showing the issuance of a patent of the United States to the railroad company, bearing date the 20th of January, 1900, constitutes no defense ; and any proof of the occupancy prior to that date or at all, seeing that as much as seven years have not elapsed since the issuance of patent, it becomes wholly immaterial, and the defense attempted to be made herein, cannot prevail, as a matter of law."

Upon the appeal to the Supreme Court of Utah the following appears among the assignments of error at page 58 of the record :

> "4. The trial court erred in giving to the jury instructions number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and each and every of said instructions, in that in so doing, it held that the defense of adverse possession could be made out in favor of the defendants and each of them, notwithstanding the evidence showed a patent by the United States had been issued no longer ago than January, 1900, to the Central Pacific Railroad Company, the grantor of plaintiff's predecessors to and for said lands described in the complaint; and notwithstanding it nowhere appeared in the evidence when the lands in dispute had been surveyed by the United States Government."

The federal question was then considered by the Supreme Court of Utah as appears from the opinion of the Court at the bottom of page 60 of the record :

> "The next question for consideration is whether the statute of limitations can prevail as a bar to the action when it appears that the patent of the U. S. Government was not issued to the plaintiff until January 20, 1900."

The plaintiff in error has therefore complied with the rule of this Court. At the outset of the trial of the case the claim made by him appeared by his objection to the evidence offered by the defendant; then again in the instructions asked for and subsequently in the assignment of errors upon the appeal to the Supreme Court of Utah. The assertion of the claims in either of these ways would have been sufficient. In addition the question was necessarily involved in the

decision of the State Court and was in fact considered at length, as appears by the opinion printed in the record in case No. 49, at page 78.

This Court would therefore seem clearly to have jurisdiction of the case. It certainly took jurisdiction of the case in Gibson vs. Chouteau, 13 Wall., 92, which was a similar case brought to this Court from the State Court of Missouri under Section 709 of the Revised Statutes.

II.

The case of the Central Pacific Railroad Company vs. Nevada, 162 U. S., 512, does not seem to limit the doctrine of the cases of Railway Company vs. Prescott, 16 Wall., 603; Railway Company vs. McShane, 22 Wall., 444; Northern Pacific Railroad Company vs. Traill County, 115 U. S., 600; Ankeney vs. Clark, 148 U. S., 345; in its application to the proposition that the United States has a lien upon and interest in the lands granted to the railroad company under the Act of 1862 until the cost of surveying, selecting and conveying the same has been paid. The Nevada case held that the Act of Congress of July 10, 1886 (24 U. S. Stat., 143), had been enacted for the purpose of avoiding the difficulty created by the decision of the cases just referred to and provided that railroad lands should not be exempted from taxation on account of the lien of the United States for surveying, etc. In other words, the Nevada case seems to emphasize the fact that the Government of the United States has an interest in and lien upon the lands in question until

the cost of surveying, etc., has been paid. This lien was in no way affected by the statute referred to in the Nevada case, except that it was not permitted to prevent State taxation of railroad lands. There is no statute providing that in spite of this lien of the United States upon the land in question a private party can obtain title thereto by adverse possession. If the Government continued to have an interest in the lands until the cost of surveying, etc., was paid, then it would seem that in the absence of a statute so providing no private individual could obtain any title to the land by adverse possession. The extent of the interest of the Government in the land is of no importance. The question is, did the Government have any interest in the land? If so, then the general principle declared by this Court in the cases of Redfield vs. Parks, 132 U. S., 239; Gibson vs. Chouteau, 13 Wall., 92; Bagnell vs. Broderick, 13 Pet., 436, that the title to public lands granted to a railroad cannot be acquired by an individual by adverse possession except by possession for the required length of time after the patent is issued by the Government for the land, would seem to control in this case.

MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM 1903

No 316.

TOLTEC RANCH COMPANY, Plaintiff in Error,

vs.

GEORGE COOK ET AL. Defendants.

BRIEF OF DEFENDANTS.

In this case the defendents relied upon the Statute of Limitations of the State of Utah as a complete defense. The defendants established their defense under the Statutes of Limitations and proved that adverse possession for a period exceeding thirty years had operated to transfer the plaintiff in error's title. No federal question is presented by this record and the defendants therefore ask that this case be dismissed.

"It is a mistake to suppose that every suit for real estate, * * * necessarily raises a question of federal cognizance.

"If this were so the title to all the vast domain,

once vested in the United States, could be brought from the State courts to this tribunal."

Carpenter vs. Williams 9 Wal. 785.

No question is raised in this record as to the validity or operative effect of an Act of Congress, the defense was the statute of limitations and the transfer of the title to the defendants.

McStay vs. Friedman 2 Otto 723.

Ronie vs. Casanova 1 Otto 379.

"The construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States."

In this case it was stipulated and agreed that the "Map of Location of the Central Pacific Railroad Company was filed in the office of the Secretary of the Interior on the 20th day of Oct, 1868." (Abs. 29.) The Central Pacific railroad paid the settlers for right of way at the time the road was being built. (Abs 37.) The recital in the deed shows that the Central Pacific railroad mortgaged this land Oct. 1st, 1870. (Abs. 45.) The patent was not issued until after this suit was commenced and the patent recited that the line of the railroad from Ogden to Sacramento "had been constructed and fully completed and equipped prior to Nov. 3rd, 1869 (Abs. 45.)

The title to the lands in dispute vested in the C. P. Railroad Co. by virtue of the Pacific Railroad

grants. That it was a grant in presenti and that the title vested upon that date has been settled by this court It is no longer an open question.

No one but the Government can raise the lien question.

"That a grant may be made by a law as well as a patent pursuant to a law has been settled by the repeated decisions of this court."

Ryan vs. Carter 3 Otto 78.

Langdeau vs. Hanes 21 Wall. 521

"If the claim be to land with defined boundaries, or CAPABLE OF IDENTIFICATION, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title."

Langdeau vs Hanes 21 Wall. 521.

"When the route of the road was definitely fixed (Oct 20th, 1868.) the sections granted became SUSCEPTABLE OF IDENTIFICATION, and the title then attached as of the date of the grant."

Salt Co. vs. Tarpey 142 U. S. 241.

In this case the legal title to the land was granted by act of Congress, the title was as effectively divested as it would be by the issuance of a patent therefor by the executive department and on the 20th day of Oct., 1868, it became subject to the statute of limitations and an adverse possession thereof from Oct. 20th, 1868, to Oct. 20th, 1875, ripened into a legal title in favor of the adverse possessor and an ad-

verse possession from Oct. 20th, 1868, to Oct. 20th, 1888, raised a conclusive presumption of a private grant in favor of the defendants. The effect of this adverse possession cannot be defeated by the subsequent issuance of a patent.

Ever since the definite location of this railroad ejectment suits have been brought upon the legal title to the land granted by the Pacific Railroad Acts without regarding the patent

Cori..ne Mill Canal & Stock Co. vs. Johnson. 156 U. S. 574.

Deseret Salt Co. vs. Tarpey 142 U. S. 241.

Tarpey vs. Madsen 178 U. S. 215.

In the latter case a patent had been issued to the defendant a homestead settler. The flaw in the settlers title as appears from the latter case is the fact that the settlers dated their settlement prior to the withdrawal of the lands instead of prior to the definite location. So that, as a matter of history, it is safe to say that the only title to all the lands covered by the cities and towns and homestead and pre-emption claims in Utah between Wyoming and Nevada is that which arises by virtue of the statute of limitations.

See also: Forrester vs. Scott 92 Cal. 398.

Jatunn vs. Smith 95 Cal. 154.

S. P. R. R. Co. vs. Whitaker 109 Cal. 268.

This action for the land in dispute was commenced before the issuance of a patent.

It appeared from the defendant's verified answer that the property had been held and possessed adversely to such legal title for thirty-two years before the commencement of the action. So under section 2861 Revised Statutes of Utah 1898 the burden of proof was on the plaintiff in error.

Tyler on Ejectment 867.

Green vs. Hawkins 19 How. 69.

There is not a scintilla of evidence in this case showing an ouster, or an entry, or seizin or possession in plaintiff or its grantors since Oct. 20th, 1868, as required by section 2859 Revised Statutes of Utah of 1898.

U. S. vs. Chaves 159 U. S. 452.

U. S. vs. Devereaux 90 Fed. Rep. 182.

Respectfully submitted;

B. H. JONES,

Attorney for the Defendants.

Supreme Court of the United States.

No. 48.—October Term, 1903.

Toltec Ranch Company, Plaintiff in Error,
vs.
George Cook, S. N. Cook, Alfred Ward, George Ward, G. J. Wells, C. F. Wells, Joseph Dudley, and Charles Dudley.

In error to the Supreme Court of the State of Utah.

[December 21, 1903.]

The Toltec Ranch Company, a California corporation, brought this action in 1901 in the District Court of the First Judicial District, Box Elder County, State of Utah, to quiet title to the S.E. ¼ of the S.E. ¼ of section 27, township 8, north of range 2 west, Salt Lake meridian, United States survey. Title in fee was alleged. The defendants answered separately, claiming different portions of the land, and each alleged peaceable, continuous and adverse possession under claim of title in himself and grantors adversely to the plaintiff for more than thirty years, and that plaintiff's cause was "barred by the statute of limitations as provided by sections 2856 and 2872, inclusive, of the Revised Statutes of Utah." Under these sections to constitute a bar there must be an adverse holding for at least seven years.

The title of plaintiff, it was admitted, was derived as follows: Patent from the United States dated January 20, 1900, to the Central Pacific Railroad Company; the railroad company by deed dated October 17, 1895, to D. P. Tarpey; the latter and wife to M. F. Tarpey by deed December 8, 1895; M. F. Tarpey to plaintiff, October 17, 1896. The patent to the company was issued in pursuance of the grant to the company made by the act of Congress approved July 1, 1862, as amended by the act of July 2, 1864, to aid in the construction of a railroad and telegraph line from the Missouri to the Pacific Ocean. (12 Stat. 489; 13 Stat. 356.)

It was admitted that the land in controversy was within the ten-mile limit of the grant to the company, and that the map of location of the railroad was filed in the office of the Secretary of the Interior on the 20th of October, 1868.

It was also admitted that no claim of any right or title to or in the right of way of the railroad company across the lands in controversy was made by any or either of the defendants.

The defendants introduced evidence to sustain the averments of their answers.

The case was submitted to a jury on special interrogatories, and the jury found that the defendants had been in possession of the land claimed by them, either by themselves or their predecessors and grantors, from some time in 1868 to the commencement of the action. The jury also returned the following verdict: "We, the jury empanelled in the above-entitled cause, find the issues joined herein in favor of the said defendants and against the plaintiff, no cause of action." Judgment was entered upon the verdict. It was affirmed by the Supreme Court of the State. The court said, after discussing questions with which we are not concerned:

"The next question for consideration is whether the statute of limitations can prevail as a bar to the action when it appears that the patent of the United States Government was not issued to the plaintiff until January 20, 1900."

The question was answered in the affirmative. The chief justice of the State granted this writ of error.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

The case is in narrow compass. The question presented is whether adverse possession under claim of right for the period prescribed by the statute of limitations of Utah before patent was issued by the United States can prevail against the latter. It has been decided by this court that adverse possession of land gives title to it and all of the remedies which attach to the title. This was expressly ruled in *Sharon* v. *Tucker*, (144 U. S. 533.) The suit was a bill in equity to establish as matter of record a title acquired by adverse possession, and it was brought against those who but for such acquisition would have been the owners. Mr. Justice Field, speaking for the court, said:

"It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the States this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall of itself constitute a complete title. (*Leffingwell* v. *Warren*, 2 Black, 559; *Campbell* v. *Holt*, 115 U. S. 620, 623.)" See also *Shelley* v. *Guy*, (11 Wheat. 361.)

Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance. And the Central Pacific Railroad Company had the title. (*Salt Co.* v. *Tarpey*, 142 U. S. 241.) It would seem, therefore, an irresistible conclusion that it could have been transferred by any of the

means which the law provided. It is, however, contended otherwise, and *Ankeny* v. *Clark*, (148 U. S. 345;) *Barden* v. *Northern Pacific R. R. Co.*, (154 U. S. 288,) and *Nelson* v. *Northern Pacific R. R. Co.*, (188 U. S. 108,) are urged to support the contention. A comparison of those cases with *Salt Co.* v. *Tarpey* becomes necessary.

Salt Co. v. *Tarpey* was an action of ejectment. Tarpey was the plaintiff in the trial court. He relied for his title upon a lease from the Central Pacific Railroad Company, and it became necessary to consider the nature of the Congressional grant to that company. The issue made was direct and unmistakable, and the decision was equally so. The plaintiff contended that the grant vested in the company the *legal title*. It was asserted on the other hand that the title to the land was retained until the cost of selecting, surveying and conveying all the granted lands was paid, and, also, that by other provisions of the granting act the title remained in the government until patent issued. Both contentions were rejected. The court said that the terms of the grant "import the transfer of a present title, not one to be made in the future. They are 'there be and is hereby granted' to the company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered." Those provisions were considered, and it was determined that they did not qualify the terms of the grant conveying the title or essentially limit them. Anticipating the question that if such be the import of the act, what was the necessity of patents, it was said, there were many reasons why the issue of patents would be of great service to the patentees. "While not essential to transfer the legal right the patent would be evidence that the grantee had complied with the conditions of the grant, and to that extent the grant was relieved from the possibility of forfeiture for breach of its conditions, . . . they would thus be in the grantee's hands deeds of further assurance of his title, and therefore a source of quiet and peace to him in his possession." And the conclusion was that "the title transferred was a legal title, as distinguished from an equitable and inchoate interest." The distinction expressed the completeness of the title conveyed.

Ankeny v. *Clark* was an action for the recovery of the value of 12,767 bushels of wheat, which had been delivered by Clark to Ankeny in pursuance of a contract by which Ankeny agreed to sell and deliver to Clark two sections of land in Walla Walla County, in what was then the Territory of Washington. After the delivery of the wheat Clark demanded a deed for the land. Ankeny, after some delay on one pretext or another, informed Clark that he could have a warranty deed to a part of the land,

and a quitclaim deed to the part which was called railroad land, and informed him, as to the latter part, that if the Northern Pacific Railroad Company could not get title he would be obliged to procure title from the government. Ankeny promised to pay the necessary expenses of obtaining title in that way. Clark refused the offer and gave notice that, unless a good title was conveyed to him for the whole of the land within five days, he would abandon possession and claim compensation for the violation of the contract. Ankeny paid no attention to the notice, and Clark brought suit for the value of the wheat and recovered. The case came to this court from the Supreme Court of the Territory. In passing on the case this court said there were three principal matters of contention in the trial court. We are concerned with only one of them, and that is, "Did Ankeny have good title to the northeast quarter of section 19, being part and parcel of the lands which he agreed to sell to Clark?" Clark asserted the negative of the question; Ankeny contended for the affirmative, and cited *Salt Co.* v. *Tarpey.* The court did not find it necessary to decide the issue thus accurately presented. It followed *Salt Co.* v. *Tarpey,* to the effect that the government could enforce the payment of the costs and could withhold the patents until they were paid, and this, it was said, "gave the government a lien for said costs." And it was hence held that Ankeny "did not hold such title as it was obligatory on the plaintiff (Clark) to accept." But *Salt Co.* v. *Tarpey* was not questioned. It was only decided that the land was subject to a lien and, so burdened, Clark was not compelled to receive it.

Barden v. *Northern Pacific R. R. Co.,* (154 U. S. 288,) was an action by the railroad company for the recovery of certain lands containing veins or lodes of rock in place bearing gold, silver and other precious metals. The plaintiff relied for title upon its grant. The defendant contended that the lands were excepted by express words from the grant. This contention was sustained. It is manifest, therefore, that the case in no way militates with the decision in *Salt Co.* v. *Tarpey,* and the court said so. Mr. Justice Field was the organ of the court in both cases, and he expressed the inapplicability of the Tarpey case and left in unimpaired. What was there said was affirmed, that the title passed at the date of the grant. Of what lands? Of those, it was held, which were not reserved as mineral. In other words, mineral lands were not conveyed, whether known or unknown to be such at the time of the grant. This was the main question decided. It was also held that the issue of patent would constitute a determination of the character of the land by reason of the power of the Land Department to determine and establish it. But it was not intimated, nor does it follow, that the conveyance of the title to the company was by the patent and not by the granting act. There was, therefore, nothing decided which detracts from *Salt Co.* v. *Tarpey.*

Nelson v. *Northern Pacific Railway* was an action brought by the railway company to recover the possession of a quarter section of land claimed to be within the land grant of Northern Pacific Railroad, and the company held a patent. Nelson claimed to have settled upon the land three years before the definite location of the road. He claimed, therefore, to be within the exceptions of the grant. The land when he settled upon it was unsurveyed, and the effect of this constituted one of the questions in the case. Upon the filing of a map by the railroad company of its general route, an order was made by the Land Department withdrawing from settlement the lands within the limits of the grant. The effect of this order was another question in the case. It was held "that the railroad company did not acquire any vested interest in the land in dispute in virtue of its map of general route or the withdrawal order based on such map," and it was further held that Nelson's settlement upon and occupancy of the land was valid, and constituted a claim upon the land within the meaning of the Northern Pacific act of 1864. In other words, it was held that the land was excluded from the grant by express words. The operative words which produced that effect were expressed in the following provision of section 3 of the act: "And wherever prior to said time [of definite location] *any* of said sections, or parts of sections, shall have been granted, sold reserved, *occupied by homestead settlers*, or pre-empted, or otherwise disposed of, *other lands* shall *be selected* by said *company in lieu* thereof," &c. This view was established in an elaborate opinion. The case, therefore, like *Barden* v. *Northern Pacific R. R.*, decided only that lands did not pass by the grant which were reserved from it. An evident proposition, whatever might have been the difficulties in determining what lands were reserved. And there were difficulties. This court in consequence divided in opinion. But those difficulties do not confront us in the case at bar. They are settled, and in their settlement no doubts were cast upon the efficacy of the grants to convey title to all the lands they covered—to all that was not reserved from them.

Judgment affirmed.

Mr. Justice BREWER concurs in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.